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**Supreme Court of the United States**

**OCTOBER TERM, 1948 1949**

**No. 336**  
**10**

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**AMERICAN COMMUNICATIONS ASSOCIATION,  
C. I. O., ET AL., APPELLANTS,**

**vs.**

**CHARLES T. DOUDS, INDIVIDUALLY AND AS RE-  
GIONAL DIRECTOR OF THE NATIONAL LABOR  
RELATIONS BOARD, SECOND REGION**

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK**

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**FILED OCTOBER 4, 1948.**



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SOUTHERN DISTRICT OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 19, 1948

[fol. 1]

**IN DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK**

Civil Action File No. 46-405

AMERICAN COMMUNICATIONS ASSOCIATION, CIO, JOSEPH P. SELLY, Individually and as President, Joseph F. Kehoe, Individually and as Secretary-Treasurer of American Communications Association, CIO, Claudia Ezekiel Capaldo, Plaintiffs,

against

CHARLES T. DOUDS, Individually and as Regional Director of the National Labor Relations Board, Second Region, Defendant

COMPLAINT—Filed June 22, 1948

Plaintiffs, complaining of the defendant, allege as follows:

First. American Communications Association (hereinafter referred to as "ACA") is a national labor organization affiliated with the Congress of Industrial Organizations. ACA is a voluntary unincorporated association consisting of more than seven (7) members. Its office is located at No. 5 Beekman Street, New York, N. Y.

Second. Joseph P. Selly is the President and Joseph F. Kehoe, is the Secretary-Treasurer of ACA.

Third. Claudia Ezekiel Capaldo is a member in good standing of the plaintiff, ACA, and is an employee of Press Wireless Inc. (hereinafter referred to as "Press Wireless"), a company engaged in the transmission of communications by radio and in an industry affecting commerce within the meaning of the National Labor Relations Act, as amended (hereinafter referred to as the "Act").

[fol. 2] Fourth. The defendant, Charles T. Douds, is the Regional Director of the Second Region of the National Labor Relations Board with offices at 2 Park Avenue in the City and State of New York.

Fifth. This action, as hereinafter more fully appears, arises under the Constitution of the United States, under

the National Labor Relations Act of July 5, 1935, 29 U. S. C. A., Secs. 151-166, as amended by the Labor Management Relations Act of 1947, Public Law 101, 80th Congress (hereinafter referred to as the "Act"), a law of the United States affecting commerce and under the Administrative Procedure Act, 5 U. S. C. A., Secs. 1001 et seq., a law of the United States.

Sixth. The purpose of ACA is to unite in one union for their mutual benefit, aid and protection all workers employed in the communications industry, including telegraph employees, in the United States, to bargain collectively with employers as to wages, hours and other conditions of employment, to advance the economic, political, social and cultural interests of its members and to protect and extend the democratic institutions of the United States and the civil rights and liberties enjoyed by its citizens.

Seventh. By the terms of its Constitution, any employee within the jurisdiction of ACA is eligible for membership in the Union without regard to sex, race, color or religious or political beliefs or affiliations, and all members of the Union in good standing are eligible to be elected officers of said Union.

Eighth. ACA has collective labor agreements with numerous employers employing thousands of members of ACA.

[fol. 3] Ninth. ACA has for many years been the collective bargaining agent of the radio telegraph workers including the operators, technicians, and other employees employed by Press Wireless, and has been in contractual relations with said Press Wireless. On or about August 13, 1947, ACA entered into a collective bargaining contract with Press Wireless covering the afordescribed employees employed by said company in the New York and California areas.

Tenth. On or about June 16, 1944, ACA was certified by the National Labor Relations Board, Second Region, as the collective bargaining representative of the employees described in Paragraph "Ninth" above.

Eleventh. The contract, dated August 13, 1947, between the parties, sets forth the terms and conditions of employment of the employees of the company, and further provides in Section 34 as follows:



"Section 34. Term of Agreement: This agreement is to become effective for a period of one year from the 7th day of August 1947, and shall remain in effect until the 7th day of August 1948, and thereafter from year to year unless notice in writing shall be given by either party to the other of its termination or any changes desired not less than the 60 days prior to the end of the then current term. The parties agree to commence negotiations on any proposed changes as soon as practicable after notice in writing of the changes desired has been given in accord herewith and not less than thirty (30) days prior to the end of the then current term. Notice of desired changes shall not be construed as notice of termination unless and until the parties are unable to agree on the proposed changes and either party has notified the other in writing that negotiations have been broken off."

[fol. 4] Twelfth. Neither ACA nor Press Wireless has given written notice of termination of the aforesaid contract, and accordingly said contract remains in full force and effect.

Thirteenth. A substantial majority of the employees of Press Wireless covered by the contract of August 13, 1947, are members of ACA and desire to be represented by it for the purposes of collective bargaining.

Fourteenth. In or about the first week in June, 1948, the Commercial Telegraphers Union, affiliated with the American Federation of Labor, (hereinafter referred to as "CTU"), filed a petition for certification of representatives at the office of the National Labor Relations Board, Second Region, wherein said CTU sought to be certified as the collective bargaining representative for the employees of Press Wireless who are presently covered by the contract of August 13, 1947, as aforesaid. Thereafter, the defendant, as Regional Director of the National Labor Relations Board notified plaintiff, ACA, of the filing of such petition and of the fact that ACA was designated as an interested party in said proceeding.

Fifteenth. On June 16, 1948, a conference was held at the office of the defendant at which there were represented ACA, CTU, Press Wireless, and the defendant.

Sixteenth. At that conference, ACA advised the defendant that in its opinion, the contract between ACA and Press [fol. 5] Wireless was still in effect and would be so for an extended period. ACA accordingly asked that a hearing be held to investigate and determine the issues raised by ACA. The representatives of ACA were then advised at that conference that in the opinion of the defendant a question affecting commerce had arisen concerning the representation of the employees of Press Wireless within the meaning of the National Labor Relations Act as amended, and that ACA did not have the right to a hearing on any question raised by the petition. That it did not have the right to object to a consent election pursuant to the provisions of the Rules and Regulations of the National Labor Relations Board, or to have its name appear on the ballot in any election to be conducted by the defendant, and ACA was thereupon asked to leave the said conference and was denied any right to participate further therein.

Seventeenth. Thereafter and pursuant to the aforesaid Rules and Regulations, a consent election agreement was entered into between the CTU and Press Wireless providing that the defendant should conduct an election among the employees of Press Wireless who are presently covered by a contract with ACA, said election is to be held between July 8th and July 23rd, 1948, the ballots being sent out by mail on July 8th and made returnable in New York on July 23rd, at 2:00 P. M. Said election agreement made no provision for the name of ACA to appear on the ballot in said election although ACA had demanded the right to appear on the ballot in the event that any election should be held.

Eighteenth. Sections 9(c)(1) and 9(c)(4) of the Act provide as follows:

"(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such [fol. 6] petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing upon due notice*. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. *If the Board finds upon the record of such hearing that*

such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." (Underscoring supplied.)

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with the regulations and rules of decision of the Board."

Nineteenth. The foregoing provisions, together with the Rules and Regulations of the Board, require that the Board hold elections only after a hearing and only if upon the record of such hearing it finds that a question of representation exists. The hearing can be dispensed with only if all parties in interest waive such hearing. These provisions of the Act constitute a radical change from the provisions of the National Labor-Relations Act prior to its amendment, which did not require hearings prior to elections for the certification of representatives and permitted the Board to hold elections prior to hearing without regard to waiver by the parties.

Twentieth. ACA is a party in interest to the proceeding for an election and has not waived its right to a hearing by stipulation or otherwise, and has not consented to the holding of such election without a hearing.

[fol. 7] Twenty-first. The sole reason assigned by the defendant for refusing to order a hearing on the questions raised by said petition despite the failure of ACA to waive such hearing, and for the refusal of the defendant to place the name of ACA on the ballot in said election, was that ACA had not filed the financial statements and affidavits required by Sections 9(f), (g) and (h) of the Act.

Twenty-second. Plaintiffs, Selly and Kehoe, have not executed and filed the affidavits required by Section 9 (b) of the Act for the reason that the requirement that such affidavits be filed constitutes an impairment of the rights of plaintiff to freedom of speech, freedom of assembly, and for the further reason that the language of the statute is too vague, ambiguous and uncertain to establish a reasonable standard of conduct. The requirement of said Section constitutes an impairment of the rights of the plaintiff



ACA, and the plaintiffs Selly and Kehoe, under Article I, Section 9 of the Constitution of the United States, and under the First, Fifth, Ninth and Tenth Amendments thereto.

Twenty-third. ACA had not, prior to the informal conference above referred to, filed with the Secretary of Labor the financial statements and other information required by Sections 9(f) and (g) of the Act because of the opinion that said provisions of the Act constitute an unconstitutional limitation upon the rights guaranteed to said plaintiff under the Constitution. However, without conceding the constitutionality of said sections of the Act, ACA did, on June 21, 1948, file with the Secretary of Labor the financial statements required by Sections 9(f) and (g) and filed with the defendant proof of compliance with said provisions of the Act.

[fol. 8] Twenty-fourth. Notwithstanding the aforesaid, the defendant has failed and refused and still fails and refuses to hold a hearing on the questions raised by the aforesaid petition, and fails and refuses to place the name of ACA on the ballot in the said election. Defendant has offered and agreed to grant the hearing requested and to place the name of ACA on the ballot in the event that said plaintiff should file the affidavits required by Section 9(h) of the Act.

Twenty-fifth. The election ordered by the Regional Director to be held on July 8, if permitted to be conducted, and unless restrained by this Court, will result in serious and irreparable injury to the plaintiffs, as well as to other members of ACA, for which there is no adequate remedy at law, in that:

A. The plaintiff ACA will suffer serious injury to its ability to represent its members employed by Press Wireless for purposes of collective bargaining, and will be threatened with interference with its freedom to organize employees at Press Wireless and elsewhere, and to establish and maintain fair wage standards and decent living conditions for its members, pursuant to the lawful purposes for which it exists;

B. ACA will be threatened with the loss of present and prospective members and the security of the union and its members will thus be imperilled.

C. In the event that ACA does not appear upon the ballot in the election to be conducted by the defendant, as above set forth, and in the event that by reason thereof a majority of the employees of Press Wireless should vote for CTU as their collective bargaining representative, ACA will be deprived of the ability to compel recognition of it as the collective bargaining representative of the employees of the said company either by strike action, because of the provisions of Section 8 (b) (4) (c) of the National Labor Relations Act as amended and Section 303 of the Labor Management Relations Act of 1947, or in any other way, despite the fact that a majority of the employees of the said company prefer ACA as their collective bargaining representative.

D. Plaintiffs, Selly and Kehoe, will be unable to perform the duties for which they were elected and to hold office in the plaintiff union, because of their refusal to sign the aforesaid affidavits upon the ground that they constitute an interference with their constitutional rights.

E. Plaintiff, Capaldo, will be deprived of representation by the collective bargaining agent of her choice, deprived of the opportunity to work under wage standards and working conditions established and maintained by ACA, which wages and conditions are superior to any others in the industry, and will be deprived of an opportunity to vote for the union of her choice in the election which the defendant proposes to conduct.

Twenty-sixth. Said defendant has acted in an improper, illegal and arbitrary manner, threatening the plaintiffs with serious and irreparable injury in that the provisions of the Act do not provide that a labor organization failing or refusing to comply with the requirements of Section 9(h) of the Act be denied a place on the ballot in a secret election to determine the choice of collective bargaining agent, but provide only that no investigation shall be made of a question concerning representation raised by such labor organization and that no such labor organization shall be eligible for certification as the representative of employees, but the defendant has, nonetheless, denied to the plaintiff union a hearing under the Act and a position on the ballot, in violation of the statute.

Twenty-seventh. As construed and applied by the defendant, the provisions of Section 9(h) are void, illegal and unenforceable and in violation of Article I, Section 9 of the Constitution of the United States and of the First, Fifth, Ninth and Tenth Amendments thereto, in that, among other things:

A. Said statute impairs free speech in violation of the First Amendment, by imposing a restraint upon the political opinions and the expressions thereof of the plaintiffs, Selly and Kehoe, and of the other officers of the plaintiff union.

B. Said statute impairs free assembly in violation of the First Amendment, by depriving the members of plaintiff union, including the individual plaintiff, of their right to elect officers of their own choosing and by seeking to prevent said members from observing the lawful provisions of the constitution of the said union, which prohibits discrimination on account of political beliefs.

C. Said statute is vague, indefinite and uncertain, and prescribes no ascertainable standard of conduct, so that any officer of the plaintiff union, including plaintiff officers, executing the affidavit specified therein in order to protect the rights of the members thereof is afforded no reasonable assurance that he will not be prosecuted under Section 35A of the Criminal Code.

D. Said statute is in effect a bill of attainder in violation of Article I, Section 9 of the Constitution, in that it imposes [fol. 11] disabilities upon plaintiffs and upon the members of plaintiff union for acts and beliefs which are not in violation of any law or statute.

E. Said statute imposes an unreasonable restriction upon the exercise of the rights of free speech and assembly by the officers and members of the plaintiff union in that it compels the loss of valuable property and other rights, as hereinbefore set forth, as a condition to the exercise of the rights of free speech and assembly, in violation of the First Amendment and the Fifth Amendment.

Twenty-eighth. The enforcement by the defendant of said void, illegal and unconstitutional provisions of the law, as hereinbefore set forth, is improper, illegal and arbitrary



and threatens the loss by the plaintiffs of valuable rights, as has been more particularly described herein, unless the plaintiffs surrender the exercise of basic rights guaranteed by the First Amendment, all in violation of the due process clause of the Fifth Amendment.

Twenty-ninth. By reason of the aforesaid conduct of the defendant in refusing to order a hearing upon the issues raised by the aforementioned petition, in violation of the provisions of the Act and in further violation of the Rules and Regulations of the Board as hereinabove set forth, ACA has been denied the right to a hearing as provided in the Act and has been denied a hearing in violation of the due process clause of the Fifth Amendment of the Constitution.

Thirtieth. Plaintiffs have exhausted all administrative remedies and there is no other remedy afforded by law or statute against the illegal acts and conduct of the defendant, save the equity powers of this Court, since the defendant can enforce said statute without resort to any court where its lawfulness can be determined, and unless the relief prayed for is granted, plaintiffs will suffer irreparable loss and damage.

[fol. 12] Thirty-first. Plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs pray that a three judge court be convened pursuant to Title 18, U. S. C. A., Sec. 3802, and for the following relief:

1. That the defendant, his agents, representatives and attorneys, be permanently enjoined and restrained from holding or conducting any election, from announcing the results thereof, or from issuing any certification based thereon, pursuant to the consent election agreement between CTU and Press Wireless, or otherwise.

2. That the defendant, his agents, representatives and attorneys, be permanently enjoined and restrained from holding or conducting any election, from announcing the results thereof, or from issuing any certification based thereon or taking any further proceeding unless and until a hearing is held as aforesaid.

3. That the defendant, his agents, representatives and attorneys, be permanently enjoined and restrained from

holding or conducting any election, from announcing the results thereof, or from issuing any certification based on the petition filed by CTU for certification as the collective bargaining representative of employees of Press Wireless without placing the name of plaintiff ACA on the ballot.

4. For an interlocutory injunction pending the trial of this action for the relief requested in paragraphs 1, 2 and 3 hereinabove.

5. For a temporary restraining order pending the hearing and determination of a motion for a temporary injunction herein.

[fols. 13-14] 6. For such other and further relief as to the Court may seem just and proper.

Yours, etc., Victor Rabinowitz, Neuburger, Shapiro,  
Rabinowitz & Boudin, Attorneys for Plaintiffs. Of-  
fice & P. O. Address, 76 Beaver Street, Borough  
of Manhattan, City of New York.

[fol. 15] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER TO SHOW CAUSE—Filed June 30, 1948

Upon the annexed affidavit of Lawrence F. Kelly, sworn to the 22nd day of June 1948, and upon the summons and complaint herein;

Let the defendant show cause before this Court at a motion part thereof before a three-judge statutory court, convened and held pursuant to Title 28, U. S. Code, Section 350a on the 24th day of June 1948, at 11 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard at the United States Court House, Room 506, Foley Square, New York, New York, why a temporary injunction should not be issued pending the trial of this action:

a. Temporarily enjoining the defendant, his agents, representatives and attorneys from preparing for, holding or conducting any election, from announcing the results thereof pursuant to the consent election agreement between Commercial Telegraphers Union A. F. L. (hereinafter referred

to as C. T. U.) and Press Wireless, Inc., or otherwise, relating to the employees of the said company;

[fol. 16] b. Temporarily enjoining the defendant, his agents, representatives and attorneys from preparing for, holding or conducting any election, from announcing the results thereof, or issuing any certification based upon a petition filed by C. T. U. for certification as the collective bargaining representative of employees of Press Wireless, Inc., except after hearing, at which plaintiff union shall have an opportunity to appear and present evidence and except after placing the name of plaintiff union on the ballot;

And why the Court should not order such other and further relief as may seem just and proper.

Sufficient cause appearing therefor, let service of a copy of this order at or before 5 P. M. on June 22nd on the defendant personally or by leaving a copy with any of his agents, representatives, attorneys or employees at his office, 2 Park Avenue, New York, N. Y., be deemed sufficient.

Dated: New York, N. Y. June 22, 1948.

John W. Clancey, U. S. D. J.

[fol. 17] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF LAWRENCE F. KELLY—Filed June 30, 1948

STATE OF NEW YORK,

County of New York, ss:

LAWRENCE F. KELLY, being duly sworn, deposes and says:

That I am the Vice-President of the Radio and Cables Department of the plaintiff ACA. That I am fully familiar with all of the facts hereinafter set forth upon which this proceeding is based.

As the complaint points out, the plaintiff union is a national labor organization with jurisdiction over employees in the field of communications covering radio telegraph workers among others. The purposes for which the union was created and for which it exists are similar to those for which other trade unions exist. We seek by means of



organization and collective bargaining to improve the wages and working conditions of members of our union and all others employed in the same industries.

The union has, since June of 1944, been the collective bargaining representative of the employees employed by Press Wireless Inc. (hereinafter referred to as Press Wireless). It [fol. 18] was certified by the National Labor Relations Board of the Second Region as the collective bargaining representative of the employees of Press Wireless in the New York area and the California area on or about June 16, 1944. It has been in contractual relations ever since that time. Its most recent agreement was entered into on August 13, 1947. The agreement of August 13, 1947 provides that it shall be effective as of August 8, 1947. The clause providing for its termination reads as follows:

"Section 34. Term of Agreement: This agreement is to become effective for a period of one year from the 7th day of August 1947, and shall remain in effect until the 7th day of August 1948, and thereafter from year to year unless notice in writing shall be given by either party to the other of its termination or any changes desired not less than the 60 days prior to the end of the then current term. The parties agree to commence negotiations on any proposed changes as soon as practicable after notice in writing of the changes desired has been given in accord herewith and not less than thirty (30) days prior to the end of the then current term. Notice of desired changes shall not be construed as notice of termination unless and until the parties are unable to agree on the proposed changes and either party has notified the other in writing that negotiations have been broken off."

Neither ACA nor Press Wireless served any notice of termination pursuant to the provisions of the above quoted paragraph, and accordingly the contract between the parties is in full force and effect.

Early in June, the Commercial Telegraphers Union, affiliated with the American Federation of Labor, (hereinafter referred to as the "CTU"), filed a petition to represent the employees covered by the contract between ACA and Press Wireless, with the National Labor Relations Board, Second Region. On June 8th, ACA was formally

advised by the National Labor Relations Board that the CTU had filed the petition for an election under Section 9(c) of the Labor Management Relations Act of 1947, and [fol. 19] that a conference on the said petition would be held at the offices of the Board on Wednesday, June 16, 1948.

On that date, a conference was held at the Board at which were present representatives of ACA including myself, representatives of CTU, representatives of Press Wireless, and of the defendant, the Regional Director of the National Labor Relations Board. At that conference, ACA advised the defendant that it had a contract which was currently in effect which it felt to be a bar to any election which might be held by the National Labor Relations Board. The defendant thereupon advised the parties that it considered the contentions of ACA to be without merit, and suggested a consent agreement for an election be entered into between the CTU and Press Wireless.

ACA then asked that a hearing be held on the issues raised by it, which request was denied by the defendant who thereupon ordered that ACA leave the conference as having no further interest in the proceeding. The defendant advised ACA that it was not entitled to a hearing or to be placed on the ballot in any election which would be scheduled in view of the fact that it had not signed the affidavits required by Section 9(h) of the Act, and in view of the further fact that it had failed to submit the financial statements required by Section 9(f) and (g). The defendant pointed out that under the circumstances, ACA's consent was not required under the Rules of the Board, and that no hearing would be held despite ACA's refusal to waive [fol. 20] a hearing. Press Wireless and CTU then entered into a consent election which was to be conducted by mail balloting, the ballots to be mailed out on the 8th day of July, 1948, and to be returned on or before July 23, 1948, at the New York office at 2:00 P. M.

It is self evident, of course, that the election which the Regional Director intends to hold, unless restrained by order of this Court, is hardly a free election designed to ascertain the true wishes of the employees of the Company. An election in which the name of one of the contending parties is omitted from the ballot is hardly calculated to protect the interests of the persons participating in the election.

The vast majority of the employees of the Company desire, in my opinion, to be represented by ACA for the

purpose of collective bargaining. Despite this fact, the failure of the Union of their choice to appear on the ballot makes it not unlikely that many of the workers, who actually desire to be represented by ACA will, in fact, vote for the CTU. This is particularly true since the alternative presented to the workers on the face of the ballot is not whether they wish to be represented by the CTU or by ACA but rather whether they wish to be represented by the CTU or by no union at all.

Since all of the workers in the Company, virtually without exception, recognize the desirability of being represented by a union, many of them may be induced to vote contrary [fol. 21] to their desires because of the form of the ballot.

As is pointed out above, the sole reason given by the Regional Director for his failure to include ACA on the ballot is that neither I nor my fellow officers have signed the affidavits required by Section 9(h) of the Act nor had the Union at that time filed the financial statements required by Sections 9(f) and (g) of the Act.

Since that time and on June 21, 1948, the plaintiff has filed the statements necessary in order to comply with Sections 9(f) and (g) of the Act. This was done without conceding the constitutionality of said Sections of the Act, but merely to facilitate the bringing of the action herein, and in order to get a prompt determination of the constitutionality of Section 9(h) of the Act, for while it is felt that Sections 9(g) and (h) interfere with the constitutional rights of the plaintiff and its members, it is felt that the interference with basic principles and constitutional rights which Section 9(h) imposes are so basic that it would be best to have a determination thereon made as promptly as possible and avoid the necessity of waiting for any decision on the questions raised by refusal to comply with Sections 9(f) and (g).

Since the filing of the financial statements required by Sections 9(f) and (g), a further demand was made upon [fol. 22] the defendant for a hearing and for a right to appear on the ballot. This demand was denied by the defendant.

As is pointed out in the Complaint, our Constitution forbids the Union to discriminate against any member because of sex, color, race or religious or political beliefs or affiliations. We probably have among our members persons who are members of all political parties, including Commu-

nists. We have no way of knowing how many such members there are since we do not inquire into the political beliefs of our members nor do we take a census of their affiliations. We would consider any inquiry into the political beliefs of a member as improper as an inquiry into his religious beliefs. We believe, and we practice what we preach, that a member of our union is entitled to hold any beliefs he may wish and that he may exercise all of the rights and privileges of a member so long as he does not violate the Union constitution.

I likewise consider any inquiry into my religious or political beliefs to be highly improper. I understand that I have, under the Constitution of the United States, the right to hold any political beliefs I wish and to either make those beliefs known or stand silent concerning them. These rights I consider to be basic to American liberties and I would be derelict in my duty as an American citizen if I did not take a stand in protecting and safeguarding those rights.

It is evident, of course, and the Complaint amply demonstrates that all of the plaintiffs will be irreparably injured if the election is permitted to proceed without ACA being on the ballot. If CTU wins the election, ACA will be unable to strike or otherwise compel recognition of it by the Employer because of the provisions of Section 8(b)(4)(C) [fol. 23] of this Act and Section 303 of the Labor Management Relations Act, 1947. If CTU loses the election, the workers employed by the Company will be without representation of any sort. The one thing which the workers want, namely representation by ACA, will be denied to them.

In practical effect, the defendant has given the plaintiffs a choice: to surrender the rights guaranteed to them under the Constitution or to lose the right to bargain collectively through their organization. Only this Court, in the exercise of its equity powers, can prevent the imposition of disabilities so inconsistent with the constitutional rights of the plaintiffs.

This proceeding seeks a permanent injunction to restrain the defendant from holding or conducting any election or issuing any certification based on the consent election agreement signed between CTU and Press Wireless, and further, that the defendant be permanently enjoined from holding

any election on the petition filed by CTU without placing the name of ACA on the ballot.

By way of interlocutory relief pending the trial of the action, plaintiff prays for an injunction to restrain the holding of the election as above set forth. Obviously, the holding of the election will seriously prejudice the plaintiffs, and in order to protect the interests of the plaintiffs, no election should be held until the critical constitutional issues raised in this proceeding have been decided.

Since the constitutionality of the National Labor Relations Act as amended, is directly attacked by this action, and since an interlocutory judgment is sought by the plaintiffs on that ground, it is necessary that a three-judge statutory [fol. 24] court be appointed in accordance with Title 28, United States Code, Section 380(a).

I am advised by my attorneys that there is presently pending in this Court, an action entitled, "Wholesale and Warehouse Union, etc. v. Douds, etc.", Civil Action 46-157, in which precisely the same issues are raised as are present in this action. I understand that a three-judge statutory court has been appointed in that proceeding and that it will hear argument on Thursday, June 24th, at 11:00 A. M. I understand that Judge Cox, who appointed that three-judge court, has been consulted on the matter, and that he suggested that this application be made returnable at the same time and place so that argument in both proceedings may be joined. In this way it will be unnecessary to secure the appointment of another three-judge court to hear argument on precisely the same point. Of course, if upon the return date, the court appointed as aforesaid prefers not to hear argument in this case, another court can be appointed and another date for argument can be set.

I am also advised by my attorneys that counsel for the Labor Board has been consulted on the matter and has no objection to the joinder of both cases for argument.

In this way also, a temporary restraining order pending argument need not be made since the application for such an order can be made to the statutory court at the time of argument.

No previous application has been made for the relief requested herein.

WHEREFORE, the plaintiffs request that an interlocutory injunction be issued by a statutory court as aforesaid pending the trial of this action:



[fol. 25] (a) Temporarily enjoining the defendant, his agents, representatives and attorneys from preparing for, holding or conducting any election, from announcing the results thereof, or from issuing any certification based thereon pursuant to the consent election agreement between C.T.U. and Press Wireless, or otherwise;

(b) Temporarily, pending the final determination of this action, enjoining the defendant, his agents, representatives and attorneys from preparing for, holding or conducting an election, from announcing the results thereof or issuing any certification based on the petition filed by C.T.U. for certification as the collective bargaining representative of employees of Press Wireless presently covered by the collective bargaining contract dated August 13, 1948, between ACA and Press Wireless, except after placing the name of American Communications Association on the ballot.

Lawrence F. Kelly.

Sworn to and subscribed before me this 22 day of June, 1948. Thomas R. Jones.

[Stamp:] Thomas R. Jones, Attorney & Counsellor-at-law; State of New York. Office address: 76 Beaver St., N. Y. 5, N. Y. Residing — Kings — — — 177 J. 9. — — — 283 Reg. A-263 — 9. Commission expires March 30, 1949.

[fol. 26] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK

Civil Action. No. 46-157

WHOLESALE AND WAREHOUSE WORKERS UNION, LOCAL 65, an  
unincorporated association of more than seven persons;  
affiliated with the United Retail, Wholesale and Department  
Store Employees of America, CIO, Arthur Osman,  
David Livingston, Jack Paley and Theodore Markowski,  
Plaintiffs,

against

CHARLES T. DOUBS, individually and as Regional Director  
of the National Labor Relations Board, Defendant

## Civil Action: No. 46-403

AMERICAN COMMUNICATIONS ASSOCIATION, CIO, JOSEPH P. SELLY, individually and as President, Joseph P. Kehoe, individually and as Secretary-Treasurer of American Communications Association, CIO, and Claudia Ezekiel Capaldo, Plaintiffs;

against

CHARLES T. DOUDS, individually and as Regional Director of the National Labor Relations Board, Second Region, Defendant

## OPINION OF THE COURT

SWAN, Circuit Judge:—In case No. 1 the facts disclosed by the amended complaint and the supporting affidavits are as follows:

Local 65 is a local union affiliated with the United Retail Wholesale and Department Stores Employees of America, CIO. It has over 13,000 members in and about the City of New York, consisting of workers employed in ware-  
[fol. 27] houses, wholesale, processing, and distributing establishments. It has approximately 1,000 collective contracts with various employers throughout the City.

On or about July 8, 1947, Local 65 entered into an agreement with F. W. Woolworth Company, concerning employment conditions for the company's warehouse employees. That agreement expires on July 8, 1948. On May 20, 1948, Local 804 of the International Brotherhood of Teamsters and Chauffeurs, A. F. of L. filed with the National Labor Relations Board, a petition to be certified as the representative of the employees of Woolworth. Local 804 and Woolworth, with the approval of the defendant, thereupon entered into an agreement for the holding of a consent election.

Local 65 has complied with Sections 9(f) and (g) of the Taft-Hartley Act, but has not complied with Section 9(h); nor can it comply because one of its officers is a member of the Communist Party. The defendant has refused plaintiff's demand for a hearing and has refused to allow plaintiff a place upon the ballot for the election

to be held, solely on the ground that plaintiff has failed to file the affidavits required by Section 9(h) of the Act. The election is to take place on June 30, 1948.

Local 65, its president, Arthur Osman, its vice president, David Livingston, its secretary-treasurer, Jack Paley and Theodore Markowski, a member in good standing in Local 65, have brought this action to restrain the defendant individually and as Regional Director of the National Labor Relations Board from conducting the election, and have moved for an interlocutory injunction. The defendant has moved to dismiss the complaint for failure to state a cause of action.

[fol. 28] In case No. 2 the facts are similar:

American Communications Association (for brevity called A.C.A.) is a national labor organization, affiliated with the CIO. On or about August 13, 1947, it entered into an agreement with Press Wireless, Inc., concerning employment conditions of the employees of the latter. The agreement provided that it should remain in effect until August 7, 1948, and thereafter from year to year unless notice in writing be given by either party of a desire to terminate the agreement, which notice must be given not less than sixty days prior to the end of any one year. No such notice was given by either of the parties.

In June of 1948, the Commercial Telegraphers Union, affiliated with the American Federation of Labor, filed a petition with the National Labor Relations Board, to be certified as the collective bargaining representative for the employees of Press Wireless. Like in case No. 1, an agreement between the employer and the rival union was made for the holding of a consent election, which was approved by the defendant.

Plaintiff has had neither a hearing nor is it to have a place on the ballot. The defendant's refusal to grant plaintiff a hearing or a place on the ballot is based solely on the ground that plaintiff has not complied with the requirements of Section 9(h) of the Act. The election is to be held between July 8 and July 23, 1948. The action is brought by A. C. A., two of its officers, and a member in good standing and the plaintiffs have moved for an interlocutory injunction. The defendant has made a cross-motion to dismiss the complaint.

Because of the short interval between the argument on

the hearing and the time set for holding the election in case No. 1, it has been impossible to prepare an opinion [fol. 29] which could discuss adequately the various legal issues presented for decision. But they are identical with issues considered at length in *National Maritime Union of America v. Herzog* by the United States District Court of the District of Columbia, which the Supreme Court affirmed on June 21, 1948 without, however, passing on the validity of § 9 (h). For the sake of expedition we shall content ourselves with referring to the *National Maritime Union* opinion for the reasoning which supports our decision.

We hold first, as did that court, that the individual plaintiffs have no standing to sue. We deny Local 65's motion for interlocutory injunction. Two members of the court, Judge Rifkind disagreeing, entertained doubt whether irreparable injury will result to Local 65 from excluding its name from the ballot. Its members are entitled to vote at the election; if they constitute a majority of the employees in the collective bargaining unit, as they claim, it would seem that they can defeat the election of Local 804 and in that event the situation will remain legally exactly what it is now. But even if exclusion of Local 65 from the ballot is an adequate showing of irreparable injury, we all agree that competing equities of greater weight justify refusal of an interlocutory injunction.

It is well established that when the right to an injunction is doubtful and the granting of a temporary injunction pending decision would work irreparable injury to a congressionally declared public policy, a court of equity will deny such relief. *Dryfoos v. Edwards*, 284 F. 596, 603 (S. D. N. Y.); *Yakus v. United States*, 321 U. S. 414, 441-2.

[fol. 30] Finally, we sustain the constitutionality of § 9 (h) for the reasons set forth at length in the majority opinion in *National Maritime Union v. Herzog*, *supra*. Accordingly, the defendant's motion to dismiss the complaint is granted.

At the present time no order can be made in case No. 2. That case was brought on for argument with the other so speedily that there was no opportunity to give to the Attorney General the notice required by § 380a of the Judicial Code. Counsel for the plaintiffs proposed to attempt to procure a waiver of such notice by the Attorney General. In

the event that such a waiver is hereafter filed, the case will be disposed of in conformity with the foregoing decision in Case No. 1.

### DISSENTING OPINION

RIPKIND, District Judge, dissenting:

Insofar as Section 9(h) of the Taft-Hartley Act excludes from the facilities of the National Labor Relations Board any labor union, one of whose officers is a member of the Communist Party or affiliated therewith, it is incompatible with the First Amendment. It abridges the freedom of speech and the right of assembly without a showing of clear and present danger. Indeed, on the argument the defendant disavowed the presence of clear and present danger. I would deny defendant's motion to dismiss the complaint.

[fol. 31] IN DISTRICT COURT OF THE UNITED STATES FOR THE  
SOUTHERN DISTRICT OF NEW YORK

Civil Action

File No. 46-405

AMERICAN COMMUNICATIONS ASSOCIATION, CIO, JOSEPH P. SELLY, individually and as President, Joseph P. Kehoe, individually and as Secretary-Treasurer of American Communications Association, CIO, Claudia Ezekiel Calpaldo, Plaintiffs,

against

CHARLES T. DOUDS, individually and as Regional Director of the National Labor Relations Board, Second Region, Defendant.

ORDER DENYING MOTION FOR TEMPORARY INJUNCTION AND  
DISMISSING COMPLAINT—Aug. 11, 1948

Application having been made for an interlocutory injunction by a three-judge statutory court in the above entitled matter, and upon the summons, amended complaint, order to show cause and supporting affidavit submitted on behalf of plaintiffs, and the defendant having moved to



dismiss the amended complaint for failure to state a claim upon which the relief can be granted, and after having heard Victor Rabinowitz, Esq., attorney for plaintiffs, in support of said application and in opposition to said motion, and Mozart Ratner, Esq., attorney for the defendant, and it appearing that the Attorney General of the United States has waived the notice required to be given him under the provisions of Section 380a of the Judicial Code by letter dated August 5, 1948, it is hereby

ORDERED, that the plaintiffs' application for an interlocutory injunction be denied, and it is further [fol. 32-33] ORDERED, that the defendant's motion to dismiss the complaint be granted.

Dated: New York, N. Y., August 11, 1948.

THOMAS W. Swan, Circuit Judge; Alfred C. Coxe,  
District Judge; — — — , District Judge.

[fol. 34] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

#### ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

American Communications Association, CIO, Joseph P. Selly, individually and as President, Joseph P. Kehoe, individually and as Secretary-Treasurer of American Communications Association, CIO, and Claudia Ezekiel Capaldo, plaintiffs in the above entitled cause, in connection with their petition for an appeal to the Supreme Court of the United States, hereby assign error to the entry of the order, and the opinion rendered therewith, entered on the 11th day of August, 1948, in the above entitled cause, and say that in the entry of the opinion and order the District Court committed error to the prejudice of the said plaintiffs in the following particulars:

1. The Court erred in granting defendant's motion to dismiss the complaint and in dismissing the complaint.

2. The Court erred in failing to issue an interlocutory injunction as prayed by plaintiffs.

3. The Court erred in holding that plaintiffs Selly, Kehoe [fol. 35] and Capaldo lacked capacity to sue.

4. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as repugnant to the Constitution of the United States in that it constitutes an impairment of the right of free speech and free assembly and is an infringement upon the right of the plaintiffs and of the other officers and members of the plaintiff union to associate and join together for their common welfare and for the effectuation of their common and lawful objectives and aims, and is a denial of the liberty of the plaintiffs without due process of law, all in violation of the First, Fifth, Ninth and Tenth Amendments.

5. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as repugnant to the Constitution of the United States, in that it is vague, indefinite and uncertain and is a denial of the liberty of the plaintiffs without due process of law, all in violation of the Fifth Amendment.

6. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as repugnant to the Constitution of the United States, in that it constitutes a bill of attainder in violation of Article 1, Section 9.

WHEREFORE, plaintiffs pray that the order of the District Court dismissing the complaint and denying plaintiffs' application for an interloutory injunction be denied.

Aug. 18, 1948.

<sup>6</sup> Victor Rabinowitz, Neuburger, Shapiro, Rabinowitz  
<sup>3</sup> & Boudin, Attorneys for Plaintiffs.

[fol. 36] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

#### ORDER ALLOWING APPEAL

It appearing to the court that the plaintiffs, American Communications Association, CIO, Joseph P. Selly, individually and as President, Joseph P. Kehoe, individually and

as Secretary-Treasurer of American Communications Association, CIO, and Claudia Ezekiel Capaldo, have filed their petition for appeal to the Supreme Court of the United States, and have filed therewith their assignment of errors, and also their statement as to the jurisdiction of the Supreme Court of the United States as required by Rule 12 of the Supreme Court Rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the order of the Court entered herein on August 11, 1948, it is

Ordered that the appeal prayed for be and the same hereby is allowed and granted to the Supreme Court of the United States from the order rendered in this cause on the 11th day of August, 1948, and that the record on appeal be made and [fols. 37-40] certified and sent to the Supreme Court of the United States in accordance with the rules of that court, said appeal being hereby made returnable forty (40) days from the date hereof;

Ordered further that the plaintiffs give a bond with good and sufficient surety in the sum of Two Hundred Fifty Dollars (\$250.00), that they as appellants shall prosecute their appeal and answer all damages and costs if they fail to make their appeal good.

Harold R. Medina, U. S. D. J.

Aug. 19, 1948.

[fol. 41] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

#### NOTICE OF APPEAL

To: A. Norman Somers, Assistant General Counsel, National Labor Relations Board.

SIR:

Please take notice that pursuant to the Statutes of the United States and Rules of the courts in such cases made and provided, American Communications Association, CIO, Joseph P. Selly, individually and as President, Joseph P. Kehoe, individually and as Secretary-Treasurer of American Communications Association, CIO, and Claudia Ezekiel

Capaldo, plaintiffs in the above entitled action, have appealed to the Supreme Court of the United States from the order of the District Court of the United States for the Southern District of New York, entered on the 11th day of August, 1948.

There is attached hereto, pursuant to paragraph 2 of Rule 12 of the Rules of the Supreme Court of the United States, copies of the following documents.

**Petition for Appeal.**

Order allowing the appeal signed by a Judge of the District Court for the Southern District of New York. [fols. 42-46] Assignment of Errors and Prayer for Reversal.  
Statement as to Jurisdiction, to which is attached Exhibit A.

Your attention is directed to paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States which reads as follows:

Within 15 days after such service the appellee may file with the clerk of the Court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this Court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm; where such a motion is made, it may be opposed as provided in Rule 7, Paragraph 3.

Victor Rabinowitz, Neuburger, Shapiro, Rabinowitz  
& Boudin, Attorneys for Plaintiffs.

August 20, 1948.

[fol. 47] SUPREME COURT OF THE UNITED STATES

**Appellants' Statement of Points and Designation of Parts of Record to Be Printed Pursuant to Rule 13, Paragraph 9, of the Revised Rules of the Supreme Court of the United States—Filed October 14, 1948**

STATEMENT OF POINTS TO BE RELIED UPON

1. This Court has jurisdiction over the subject matter of the complaint in that, among other things, it involves the issue of the constitutionality of an Act of Congress.

2. Section 9(h) of the Labor Management Relations Act effects a limitation on the rights guaranteed by the First Amendment of the Constitution and therefore there is a presumption of its unconstitutionality.

3. Section 9(h) of the Labor Management Relations Act abridges the rights guaranteed to each of the plaintiffs by the First, Fifth, Ninth and Tenth Amendments to the Constitution.

4. Trade unions as well as their officers and members are entitled to the protection of the First and Fifth Amendments.

5. Plaintiff union, its officers and members, have property rights of which they have been deprived by reason of the provisions of Section 9(h) of the Labor Management Relations Act, and its application.

[fol. 48] 6. Political rights of free speech and affiliation, and the right of union members to choose their own officers, involve constitutional rights of freedom of assembly, association and speech, which are protected by the First Amendment and which are infringed upon by Section 9(h) of the Labor Management Relations Act.

7. A legislative declaration of guilt which is contained in a bill of attainder is *a fortiori* a violation of the due process clause of the Fifth Amendment.

8. Denial of government services and facilities must be in accord with constitutional guarantees.

9. The legislature may not impose restrictions on the freedoms guaranteed by the First and Fifth Amendments in the absence of a clear and present danger to the community. There is no clear and present danger which this section of law is designed to meet.



10. Section 9(h) of the Labor Management Relations Act effects a curb upon opinion and belief which enjoy constitutional immunity from any regulation.

11. The method of enforcing Section 9(h) of the Labor Management Relations Act does not save its constitutionality. On the contrary, the respondent's method of enforcement of this Section emphasizes its unconstitutionality.

12. Even if there were a rational basis for Section 9(h) of the Labor Management Relations Act, that in itself would be insufficient to warrant the restrictions of civil liberties which it imposes.

13. The rights guaranteed by the First, Fifth, Ninth and Tenth Amendments may not be abridged by indirection.

14. Section 9(h) of the Labor Management Relations Act is unconstitutional because of the vagueness of its terms.

[fol. 49]. 15. Section 9(h) of the Labor Management Relations Act is unconstitutional because it seeks to adopt the unconstitutional test of guilt by association.

16. Section 9(h) of the Labor Management Relations Act is repugnant to Article I, Section 9, of the Constitution, as being a bill of attainder.

#### DESIGNATION OF PARTS OF THE RECORD DEEMED NECESSARY BY APPELLANT

- (1) Complaint, filed on June 22, 1948.
- (2) Order to Show Cause, dated June 22, 1948 and filed June 30, 1948.
- (3) Affidavit of Lawrence F. Kelly, dated June 22, 1948 and filed June 30, 1948.
- (4) Opinion of the Court.
- (5) Order denying motion for temporary injunction and dismissing the complaint, dated August 11, 1948.
- (6) Notice of Appeal.
- (7) Assignment of Errors and prayer for reversal.

Victor Rabinowitz, Neuburger, Shapiro, Rabinowitz & Boudin, Attorneys for Appellants, 76 Beaver Street, New York, New York.

New York, New York, October 12, 1948.

[fol. 50]

## AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,

City of New York,

County of New York, ss:

Belle Seligman, being duly sworn, deposes and says that she is an attorney in the offices of Neuburger, Shapiro, Rabinowitz & Boudin, attorneys for the above named appellants herein. That on the 12th day of October, 1948, she served the within Statement upon A. Norman Somers by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post-Office Box regularly maintained by the United States Government at 76 Beaver Street, in said County of New York, directed to said attorney for the respondent at 815 Connecticut Avenue, N. W., Washington, District of Columbia, that being the address within the District designated by him for that purpose upon the preceding papers in this action, or the place where he then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Belle Seligman.

Sworn to before me this 12th day of October, 1948.

Kate Scherer, Notary Public, State of New York.

[fol. 50a] [File endorsement omitted.]

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—November 8, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 53,338, U. S. D. C., Southern New York, Term No. 336. American Communications Association, C. I. O., et al., Appellants, vs. Charles T. Douds, Individually and as Regional Director of the National Labor Relations Board, Second Region. Filed October 4, 1948. Term No. 336, O. T. 1948.

LIBRARY  
SUPREME COURT, U.S.

## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1948-49

No. 431 13

UNITED STEELWORKERS OF AMERICA, ET AL.,  
PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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PETITION FOR CERTIORARI FILED NOVEMBER 24, 1948.

CERTIORARI GRANTED JANUARY 17, 1949.

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IN THE  
**United States Circuit Court of Appeals**  
**FOR THE SEVENTH CIRCUIT**

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No. 9612  
**INLAND STEEL COMPANY,**  
*Petitioner,*  
v.  
**NATIONAL LABOR RELATIONS BOARD,**  
*Respondent,*  
**UNITED STEELWORKERS OF AMERICA,**  
*C.I.O., et al.,*  
*Intervenors-Respondents.*

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No. 9634  
**UNITED STEELWORKERS OF AMERICA,**  
*C.I.O., et al.,*  
*Petitioners,*  
v.  
**NATIONAL LABOR RELATIONS BOARD,**  
*Respondent.*

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*On Petitions for Review of Orders of the National Labor  
Relations Board*

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**APPENDIX TO BRIEF FOR PETITIONERS IN CASE**  
**No. 9634**

---

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---

ARTHUR J. GOLDBERG  
FRANK DONNER  
MARTIN KURASCH  
*Of Counsel*

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**Case No. 13-C-2836**

**In the Matter of  
INLAND STEEL COMPANY  
and**

**LOCAL UNIONS NOS. 1010 and 64, UNITED STEEL-  
WORKERS OF AMERICA (CIO)**

*Mr. Herman J. De Koven, for the Board.*

*Pope & Ballard, by Mr. Ernest S. Ballard, and Mr. Merrill Sheppard, of Chicago, Ill., and Mr. William G. Caples, of Chicago, Ill., for the Respondent.*

*Mr. Frank J. Donner, of Washington, D. C., for the Union.*

**DECISION AND ORDER**

On January 8, 1947, Trial Examiner Sidney Lindner issued his Intermediate Report in the above-entitled proceedings, finding that respondent, Inland Steel Company, had engaged and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action; as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent, counsel for the Board, and Local Unions Nos. 1010 and 64, United Steelworkers of America, herein called the Union, all filed exceptions and supporting briefs.

On June 3, 1947, the Union filed a motion to reopen the record for the purpose of introducing documentary evidence purporting to show that at a time after the hearing, social insurance plans (including plans for old age retirement benefits and sick and accident benefits) were subjects of collective bargaining throughout the basic steel industry of which the respondent is a part, and that such collective bargaining has resulted in a number of joint agreements embodying provisions for employer-financed social insurance plans. This motion is opposed by the respondent on the ground that the proffered evidence is immaterial to the central issue of whether pension plans *must* be the subject of collective bargaining

between an employer and the representative of its employees under the Act, and on the further ground that, insofar as the proffered evidence tends to show what *may* be appropriately included in a collective bargaining contract, it is cumulative.

We do not agree with the respondent that the proffered evidence is immaterial, because one of the grounds upon which respondent bases its position that the Act does not obligate bargaining about pension and retirement plans is that such plans are not, as a practical matter, adaptable to the processes of collective bargaining or to the device of a trade union agreement. Clearly, therefore, actual proof of the existence of trade union agreements providing for employer-financed pension and retirement plans or for similar employee benefit plans provides a valid means for the Union to meet the respondent's position and would be relevant. Such proof, however, is available in the record as it now stands,<sup>1</sup> as well as in the facts reported in official publications of government agencies of which we take judicial notice.<sup>2</sup> Accordingly, we hereby deny the Union's motion for leave to reopen the record.

On November 18, 1947, the Board at Washington, D. C., heard oral argument, in which respondent and the Union participated.

The Board has reviewed the rulings of the Trial Examiner made at the hearing, and finds that no prejudicial error was committed. The Board has considered the Intermediate Report, the exceptions and briefs filed by respondent, the Union, and the Board's counsel, the arguments of counsel, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner<sup>3</sup> insofar

<sup>1</sup> Respondent makes no claim that the nature of the industry is a factor in the possible impracticability of the trade union agreement device.

<sup>2</sup> Cf. *Matters of Sorg Paper Co.*, 25 N.L.R.B. 936, 950.

<sup>3</sup> Respondent apparently contends that adoption of the opinion of the Trial Examiner on the question of law presented by the issue of statutory construction would constitute a violation of its constitutional right to a fair hearing. This contention is based upon the fact that, for the purpose of seeking enlightenment as to certain pertinent interpretative facts, the Trial Examiner did not confine his search to the numerous publications of various economic and labor relations authorities which were included in the briefs of the parties and were incorporated in the record by stipulation of the parties. We find no merit to this contention. For, as the Supreme Court has plainly indicated,

as such findings, conclusions, and recommendations are consistent with the decision and order which follows.

The Trial Examiner found that the respondent had engaged and is engaging in violations of Section 8 (5) and (1) of the Act by failing and refusing to bargain with the Union about the application or modification of the terms of an old age retirement and pension program. This program was originally established by respondent at a time antedating the employees' of a statutory representative in 1941; it was unilaterally amended in December 1944 and in December 1945, and, as so amended, its terms were invoked in or after February 1946 to effect the separation of employees from active service. The Examiner's findings as to the existence of unfair labor practices stem from the respondent's failure and refusal to discuss with the Union, in 1945 and 1946, the amendment and application of the terms of the pension and retirement program and their relation to the collective bargaining contract then in effect. In the opinion of the Trial Examiner, the respondent, by *unilaterally* amending the pension program, actually changed the employees' "wages" and "conditions of employment" as these terms are used in Section 9 (a) of the Act.

The factual findings respecting the respondent's refusal and failure to discuss its pension program with the Union are not

resort by officials acting in a judicial capacity to all relevant extrinsic aids to meaning of statutory terms is an appropriate corollary to the exercise of the judicial function and is commanded by common sense. See e.g., *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 183-186; *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 335; *N.L.R.B. v. Hearst Publications, et al.*, 322 U.S. 111, 121-122, 127; *Cf. Republic Aviation Co. v. N.L.R.B.*, 324 U.S. 793, 799-800. See also Ziskind, *Use of Economic Data in Labor Cases*, 6 Univ. of Chicago Law Review 607 (1939).

Moreover the major portion of the information we have here used is available in numerous official publications of government agencies which we cite herein.

As we have indicated above, we may and do take judicial notice of the facts reported in such publications.

Section 8 (5) and (1) of the Act have been reenacted as Section 8 (a) (5) and Section 8 (a) (1).

In setting forth the facts concerning the first amendment of the pension program, the Trial Examiner states that the amendment was effected December 1943. The record shows that the amendment was executed by respondent in December 1944 or January 1945, but the terms of the amendment became retroactively effective in December 1943.

seriously disputed. The legal conclusion that these acts constitute unfair labor practices within the meaning of Section 8 (5) and (1) of the Act is, however, squarely challenged on two principal grounds. One is premised upon a construction of the Act as excluding pension and retirement plans from the mandatory area of collective bargaining. The other is premised upon a construction of the collective bargaining agreement in effect between these parties at the time the refusals to bargain occurred, as containing a waiver by the Union of any right to bargain about pension and retirement programs. We shall consider each of these broad defenses separately.

#### **A. Respondent's contention as to the meaning of the statutory provisions**

The respondent claims that the term "wages," as used in the Act, means the "wages earned" by employees for actual performance of work or productive activity, and that pension benefits are based on the economic philosophy that holds that such benefits are not earned by the expenditures of productive effort on the part of employees, but are determined by the length of time over which employees perform their work.\* We are of the opinion, however, that regardless of the validity of this economic philosophy of pension benefits, there is no basis for concluding that such a narrow and technical definition of "wages" was intended by Congress in delineating the statutory area of collective bargaining.

One of the broad purposes of the Act, as set forth in Section 1 thereof, is to encourage collective bargaining as to "wage rates and the purchasing power of wage earners" as a means of eliminating industrial strife. To implement this objective, the Congress, in generally defining the ambit of obligatory collective bargaining, used not only the specific terms "rates of pay" and "hours of employment," but also the broad generic and widespread phrase "*wages and other conditions of employment.*" It is significant that the same Congress which

\* This is the opinion of one expert in the field of the construction of industrial pension plans. See A. D. Cloud, *Pensions in Modern Industry* (Chicago, 1930) pp. 28, 439, 441, 444-445; Cf. Murray W. Latimer, *Industrial Pension Plans* (Industrial Counsellors, Inc., 1932), pp. 9-10, 751-754, 764-766, 771-789, 891-921.



originally enacted the statutory provisions here involved also enacted the Social Security Act, and that the provisions of both statutes were part of the over-all legislative scheme of broad social legislation.<sup>1</sup> In the Social Security Act, Congress defined the taxable "wages" paid for "employment" as embracing all "remuneration" for "any service . . . performed . . . by an employee for his employer."<sup>2</sup> The Supreme Court recently stated that in employing these terms for the purpose of accomplishing broad social policies, Congress was not thinking of "wages earned" for "work done," but of "the entire employer-employee relationship for which compensation is paid to the employee by the employer."<sup>3</sup>

With due regard for the aims and purposes of the Act and the evils which it sought to correct, we are convinced and find that the term "wages" as used in Section 9 (a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. There is indeed an inseparable

<sup>1</sup> The Fifth Circuit Court of Appeals recently admonished the Board that "definition by Congress in the Social Security Act . . . should have much persuasiveness in any attempt to define (the same terms) under the National Labor Relations Act." *N.L.R.B. v. John W. Campbell, Inc.*, 159 F. 2d 184, 186.

<sup>2</sup> 49 Stat. 642-643, Sec. 907, 42 U.S.C.A. No. 1107.

<sup>3</sup> *Nierotko v. Social Security Board*, 327 U.S. 358, 365-366. The Supreme Court appended the following footnote, pertinent here, to the statement above quoted:

"For example the Social Security Board's Regulations No. 3 in considering 'wages' treats vacation allowances as wages, 26 CFR 1940 Supp., 402, 227 (b)."

Compare *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S. Ct. 165, 168. Treasury Department Regulations No. 91 relating to the Employees' Tax under Title VIII of the Social Security Act, 1936, Art. 16, classifies dismissal pay, vacation allowances or sick pay, as wages. Regulations 106 under the Federal Insurance Contributions Act, 1940, pp. 48, 51, continues to consider vacation allowances as wages. It differentiates voluntary dismissal pay . . . In regulations governing the collection of income taxes on or after January 1, 1945, 58 Stat. 247, the Bureau of Internal Revenue classified vacation allowances and dismissal pay as wages under the following statutory definition of wages:

"Sec. 1621. Definitions. As used in this subchapter—

"(a) Wages. The term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such terms shall not include remuneration paid . . ." See 26 CFR, 1944, Supp., 405, 101 (d) and (e)."



nexus between an employee's current compensation and his future pension benefits. Regardless of the particular economic considerations that may motivate the establishment of a pension system, the fact remains that the employer's financial contribution thereto, in whole or in part, on behalf of the employees provides a desirable form of insurance annuity which employees could otherwise obtain only by creating a reserve out of their current money wages or by purchasing similar protection on the open market. In substance, therefore, the respondent's monetary contribution to the pension plan constitutes an economic enhancement of the employee's money wages. Their actual total current compensation is reflected by both types of items.<sup>10</sup> Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure, and the character of the employee representative's interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is effected.<sup>11</sup> Indeed, the practice of offering retirement benefits in lieu of current wage increases is not uncommon in bargaining between employers and employees' representatives.

Moreover, as indicated above, in all fields of law dealing with Congressional legislation for the protection of public rights, the term "wages" has consistently been construed to

<sup>10</sup> As is pointed out by the Trial Examiner in his Report, economists and experts in the field of labor relations concur in this view. Typical of this conclusion is the following statement:

"The payment of insurance of his workers assumed by an employer must be considered as an additional compensation for services rendered differing only in form of payment from the ordinary weekly wage." Lieberman, *The Collective Labor Agreement*, p. 132 (Harper Bros., 1939). See also, Z. Clark Dickinson, *Collective Wage Determination*, (Ronald Press, 1941), pp. 72-74.

Compare the decision of the First Circuit Court of Appeals in *Hackett v. Comm'r of Internal Revenue*, 159 F. 2d 121, where the Court held that premiums paid for by the employer for the purchase of employee annuity contracts were taxable as income to the recipient even though the employees had no right to receive cash instead of the annuity contract. The Court stated that the receipt of the annuity constituted an economic benefit conferred as additional compensation which is the equivalent of cash. See also *Hubbell v. Comm'r of Internal Revenue*, 150 F. 2d 516 (C.C.A. 6).

<sup>11</sup> Cf. *N.L.R.B. v. J. H. Allison Co.*, 165 F. 2d 766 (C.C.A. 6), enforcing 70 N.L.R.B. 377.

include increments, such as retirement benefits or other types of dismissal pay rights, which flow to employees because of their longevity. Thus, in exercising our statutory power under Section 10 (c) of the Act to "reinstate with back pay," we have, in effect, uniformly held that pension and other "beneficial" insurance rights constitute a part of the employees' real wages and have accordingly required restoration of those benefits as part of our make whole order. The Courts have approved.<sup>12</sup>

In the field of taxation, pensions and retiring allowances have regularly been taxed by the Treasury Department since 1918, as income to the recipients by application of the Internal Revenue Act definition of wages as "compensation for personal services." The validity of this construction of the Revenue Act by the Treasury Department has been expressly sustained by the courts.<sup>13</sup> One court decision, for example, uses

<sup>12</sup> *Butler Brothers, et al. v. N.L.R.B.* 134 F. 2d 981, 985 (C.C.A. 7) enforcing 41 N.L.R.B. 843, 871; *N.L.R.B. v. General Motors Corp.*, 150 F. 2d 201 (C.C.A. 3), enforcing with modifications not here pertinent, 59 N.L.R.B. 1143, 1154, 1156. See also, *N.L.R.B. v. Stackpole Carbon*, 128 F. 2d 188, 191 (C.C.A. 3) where the Court, in commenting upon an order requiring restoration of insurance rights to the victim of an employers' discrimination, said: "This conclusion seems to us to be in line with the purposes of the Act, for the insurance rights in substance were part of the employee's wages."

The same principle, so far as the field of labor relations law is concerned, is given effect, *inter alia*, in decisions of the War Labor Board cited by the Trial Examiner at p. 7, and note 11 of the Intermediate Report; in the *Basic Steel* case, in which respondent was a party, 19 W.L.B. 568, 572; in the decision of a labor arbitrator, *In Re Fifth Avenue Coach Co.*, 4 Labor Arbitration Reports, 548, 562; and in the definitions of dismissal compensation made by the U. S. Bureau of Labor Statistics, Bulletin No. 686, p. 71; Bulletin No. 808, p. 2. See also our decision in *Matter of C. B. Cottrell & Sons Co.*, 34 N.L.R.B. 457, 469-470.

<sup>13</sup> *Hooker v. Hooley*, 27 F. Supp. 489, 490 (Dist. U.S.D.N.Y.), affirmed *per curiam* on opinion of District Court, 107 F. 2d 1016 (C.C.A. 2). Cf. *Lincoln Electric Co. v. Commissioner*, 162 F. 2d 379 (C.C.A. 6) (insurance premiums paid by an employer on an employee retirement plan held to be "ordinary and necessary expenses" within meaning of Internal Revenue Act and as such, deductible for income tax purposes). Compare, also, the following cases interpreting various kinds of employer provisions as being "compensation for personal services" for tax purposes: *Commissioner v. Smith*, 324 U.S. 177; *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U.S. 716; *Hackett v. Commissioner of Internal Revenue*, 159 F. 2d 121 (C.C.A. 1); *Hubbell v. Commissioner of Internal Revenue*, 150 F. 2d 516 (C.C.A. 6); *Oberwinder v. Commissioner of Internal Revenue*, 147 F. 2d 255 (C.C.A. 8); *Vanderhoeve*

the following pertinent language (*Hooker v. Hooley*, *supra* note 13, 27 Fed. Supp., at p. 490): "A pension is a 'stated allowance or stipend made in consideration of past services on the surrender of rights or emoluments to one retired from service,' Webster's new International Dictionary. It cannot be doubted that pensions of retiring allowances paid because of past services are one form of compensation for personal service and constitute taxable income."

Likewise in the administration of the Bankruptcy Act provisions for the award of priorities to "wages . . . which have been earned" up to certain sums," a Federal Court, sitting in equity, felt impelled by the economic foundation of the doctrine of dismissal or severance pay, to hold that such dismissal pay obligations accruing out of a collective bargaining contract, constituted "wages," entitled to the same priorities as other wage claims.<sup>13</sup>

The Trial Examiner found that the pension plan constituted a "condition of employment" as to which collective bargaining is obligatory under the Act. The respondent concedes that the retirement rule, which compels severance of the employment relation at the age of 65, affects tenure of employment, but contends that the Act does not compel bargaining on such matters. The burden of the respondent's argument is that the term "conditions of employment" has no broader meaning than that perhaps spontaneously suggested by the term "working conditions," and that it therefore refers to the physical conditions under which employees are compelled to work rather than to the terms or conditions under which employment status is afforded or withdrawn.

We believe, however, that the express definitions of the Act itself and the controlling judicial and other authoritative interpretation of the Act, render the respondent's contention without merit.

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*v. Allen*, 158 F. 2d 467 (C.C.A. 5); *Wilkie v. Commissioner of Internal Revenue*, 127 F. 2d 953 (C.C.A. 6); *Levey v. Helvering*, 68 F. 2d 401 (App. D.C.); See also *George A. Fuller Co. v. Brown*, 15 F. 2d 672; *Robert v. Mays Mills*, 114 S.E. 432, for discussion of general principles here pertinent.

<sup>13</sup> Sec. 64, sub. a (2) of the Bankruptcy Act, 11 U.S.C.A., No. 104, sub. a (2).

<sup>14</sup> *In re Public Ledger*, 161 F. 2d 762 (C.C.A. 3).

A synthesis of the definitions in Section 2 (4), (5), and (9) of the Act and the reasonable implication of the proviso to Section 8 (3), viewed in relation to Section 8 (5), compel the conclusion, and we find, that matters affecting tenure of employment, like the respondent's retirement rule, lie within the statutory scope of collective bargaining." Any other view would remove bargaining with respect to such matters as seniority and union security provisions from the conference table to the picket line." Indeed, the Supreme Court has specifically held that the statutory scope of collective bargaining extends to matters involving discharge actions.<sup>18</sup> Significantly, Senator Wagner, in addressing the 80th Congress with respect to the 1947 amendatory legislation, recently stated that the term "condition of employment" as used in the original act was intended to have a broader meaning than "working conditions" and included such subjects as "pension plans, and insurance funds which properly belong in the employer-employee relationship . . ." (93 Congressional Record 3427).

Respondent would nevertheless have us employ the more restrictive construction of the Act it has proposed because, allegedly, there is evidence in the legislative and historical background of the Act requiring the inference that exclusion of such plans from the area of obligatory bargaining was specifically intended by the 74th Congress, and further, because effective contractual regulations of the terms of such complex schemes as the one here involved could not, as a practical matter, be achieved, within the settled framework of collective bargaining through fixed units and short-term contracts.

The respondent's claim that evidence of exclusion of the kind of group insurance schemes here involved can be found in the legislative background of the Act rests upon certain

<sup>18</sup> The Report of the Senate Committee on Education and Labor on the Act pointed out that the broad phraseology of Section 2 (5) of the Act was deliberately framed "to extend to all organizations of employees that deal with employers in regard to 'grievances' and 'labor disputes'," the guarantee of Section 7 and the protection of Section 8. *Report No. 573 on S. 1958, 74th Cong., 1st Sess. (1935), at p. 7.*

<sup>19</sup> These matters form a substantial part of the historical picture of bargaining demands customarily proposed or achieved by unions as part of collective bargaining.

<sup>20</sup> See *National Licorice Co. v. N.L.R.B.*, 309 U.S. 360-361.



contemporaneous statements made by Senator Wagner and the Senate Committee on Education and Labor regarding industry-supported pension and insurance schemes. These framers of the Act told Congress that the provisions of the Act were deliberately drawn, insofar as pension and other group insurance schemes were involved, with two objectives in mind: (1) to include the discriminatory undertaking by employers of the support of pension or other welfare insurance plans, or the discriminatory application of the terms of such plans, within the reach of the statutory prohibitions; and (2) to include nothing in the Act which would hamper or otherwise restrict the then growing tendency \* of employers to institute or contribute to such plans. The first objective was

\* Support for such employee benefit schemes had then been assumed in some cases at the request of organized employee agencies whose functions were not confined solely to representing employees in bargaining, but also included the administration of various types of welfare funds. The employer's undertaking was frequently incorporated into the collective contract. See, e.g., as to the unemployment insurance plan contracted for by various national unions representing employees in the clothing and other well-organized industries: *U. S. Bureau of Labor Statistics*, Bull. No. 393, pp. 51, 52, 55. (Trade Agreements 1923, 1924); Bull. No. 448, pp. 69, 78-80 (Trade Agreements 1925); Bull. No. 448, pp. 70-71, 78-79 (Trade Agreements 1926); Bull. No. 468, p. 71; Bull. No. 491, pp. 701-703 (Handbook of Labor Statistics, 1929 Ed.); Bull. No. 541, pp. 673-675 (Handbook of Labor Statistics, 1931 Ed.); Bull. No. 616, pp. 816-818 (Handbook of Labor Statistics, 1936 Ed.); as to the life insurance and sickness and pension benefit plans contracted for by various locals of the Amalgamated Association of Street and Electric Railway Employees and by the International Brotherhood of Electrical Workers: *U. S. Bureau of Labor Statistics*, Bull. No. 541, pp. 383-385 (Handbook of Labor Statistics, 1931 Ed.); *Monthly Labor Review*, Vol. 30 (Feb. 1930) pp. 10-12 (Life Insurance and Old Age Pensions Established by Collective Agreement); as to establishment and administration of group benefit schemes through employer-employee organizations of one company, generally, see *U. S. Bureau of Labor Statistics*, Bull. No. 634, pp. 63-64 (Characteristics of Company Unions, 1935); see also the testimony of various unaffiliated one-company union representatives at the hearing on the bill before the Senate Committee on Education and Labor (74th Cong., 1st Sess.) at pp. 284-286, 298-303, 398, 415.

\* The Report of the Senate Committee on Education and Labor on the 1935 Act (Senate Report No. 573, on S. 1958, 74th Cong., 1st Sess., p. 10) articulates the legislators' concern with this problem as follows:

"This bill does nothing to outlaw free and independent organizations of workers who by their own choice limit their cooperative activities to the limit of one company. Nor does anything in the bill interfere with the freedom of employers to establish pension benefits, outing clubs, recreational societies and the like, so long as such organizations



accomplished by the drafting of the provisions of Section 8 (2) and 8 (3) of the Act; the second by the specific enumeration in Section 2' (5) of the type of employee-organization functions which the Congress desired should be free of employer domination or control. In other words, the legislative history relied on by the respondent was developed in connection with Section 8 (2) of the original Act; and it indicates no more than that Congress desired to assure employers that their contribution to an organization administering a pension plan would not be considered unlawful under Section 8 (2) of the Act provided such organization did not otherwise come within the definition of Section 2 (5) of the Act and that the administration of such plan was not designed to discourage or encourage membership in a bona fide labor organization.

We find nothing in these statements of the proponents of the Act about industrial insurance schemes which negatives the subsumption of the monetary or other aspects of employee insurance schemes under a broad interpretation of "wages" or "conditions of employment" or which evidences Congressional adoption of the narrower sense of these terms.

Respondent also contends that the absence of a general practice of collective bargaining with respect to pension or other similar social insurance schemes before 1935 supports its position that bargaining within the meaning of the Act does not include such matters. In support of this position, the respondent relies upon the Supreme Court's statement in the *Railroad Telegrapher's* case<sup>2</sup> that the Act is generally, "considered to absorb and give statutory approval to the philosophy

do not extend their functions to the field of collective bargaining, and so long as they are not used as a covert means of discriminating against or in favor of membership in any labor organization. Such agencies, confined to their proper sphere, have promoted amicable relationships between employers and employees and the committee earnestly hopes that they will continue to function."

To the same effect, see Senator Wagner's statement on this and a predecessor bill at 78 Cong. Record, 3443-3444; 79 Cong. Record, 2371-2372, 7570; and at p. 15 of the record of the hearings on the bill held by the House Committee on Education and Labor, and on p. 41 of the hearings on the bill held by the Senate Committee on Education and Labor (74th Cong., 1st Sess).

<sup>2</sup> *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346.

of bargaining as worked out by the labor movement in the United States." However, this principle, as used by the Supreme Court in that very case, offers no support for the respondent's position. The Supreme Court there states that statutory collective bargaining includes bargaining "about the exceptional as well as routine" matters affecting wages, hours, and other conditions of employment and that collective bargains "need not and do not always settle or embrace every exception" (321 U.S., at p. 347). In our opinion the Supreme Court implicitly recognized that the general scheme of bilateral negotiation was the means contemplated by the Act to adjust any difference between employers and employees arising directly out of the employment relationship, and that this means—collective bargaining—was to be used irrespective of the fact that the specific difference to be adjusted had not previously been regularly considered in the framing of collective bargains.\* This view is not only consistent within, but is supported by, the fact that Congress, in seeking to promote industrial peace through collective bargaining, did not attempt to catalog all the various matters which might give rise to industrial strife, absent the ameliorating influences of the bargaining process.

In any event, we are convinced, and we find that the historical pattern of collective bargaining with respect to social insurance plans, whatever it be," affords no reasonable basis

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\* See also, *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 45, where the Supreme Court says, "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act itself does not attempt to compel."

"It is unreasonable to expect that, prior to 1935, unions would have been able to negotiate effectively for any thing more than the establishment of the routine terms of wages, hours, and conditions of employment, because the failure of most employers voluntarily to accept the processes of collective bargaining placed most unions in a weak position.

Nevertheless, so far as facts can be assembled about the bargaining platforms of unions at that time, it plainly appears that at the bargaining table, unions approached the problem of bargaining for the protection of employees against the hazards of unemployment both directly, in seeking financial benefit provisions in the collective contract, and indirectly, by seeking measures designed to protect against the industrial causes of ill health, premature ageing and insecure employ-

for supplying a Congressional intent to exclude such plans from the ambit of obligatory bargaining."

Nor do we believe, as contended by the respondent, that contractual regulation of the terms of pension plans cannot, as a practical matter, ever be achieved within the settled framework of collective bargaining. As the Supreme Court has recently recognized, the terms of employer support of complex beneficial programs of the type here involved "normally constitute the subject matter of collective bargaining." *United States v. United Mine Workers of America*, 67 S. Ct. 677, 693, and are demonstrably adaptable to the trade union agreement device.\* There is no question that the bargaining task is a more difficult one where, as is the case with respondent.

See e.g. the authorities cited *supra*, at footnote 19, and those cited by the Trial Examiner at page 8 of the Intermediate Report, footnotes 12, 13, and 14. See also the following: *U.S. Bureau of Labor Statistics Bull. No. 393*, pp. 3, 5, 9, 11, 13, 14, 15, 20, 33, 34, 37, 38, 42, 59, 60, 64, 67, 68, 70, 71, 74, 81, 94-95, 106, 110, 118, 123, 126 (Trade Agreements, 1923, 1924); *Bull. No. 419*, pp. 5-6 (Trade Agreements, 1925); *Bull. No. 448*, p. 8 (Trade Agreements, 1927); *Bull. No. 491*, pp. 476, 480 (*Handbook of Labor Statistics 1929 E.I.*); *The Report of the Convention Proceedings of the A.F.L.* (1929, pp. 48-51, 288-290); (1930, p. 83); (1933, pp. 93-94, 111); (1934, pp. 117-118); (1935, p. 41); and the various summaries of trade union agreement provisions in the Labor Department's Monthly Labor Reviews during the period from 1930 through 1935.

\* Respondent further argues that the *Heinz* case (*H. J. Heinz Company v. N.L.R.B.* 311 U.S. 514) requires that Board to limit the scope of the statutory obligation to bargain to matters which historically had been encompassed in the practice of collective bargaining as known at the time the Wagner Act was passed. That argument is based upon the mistaken assumption that the *Heinz* case and this case present analogous situations. There the Board and the Court were required to decide whether signed contracts historically were part of the technique of collective bargaining in order to determine whether Congress intended to import an obligation to make signed contracts into the Act, as part of the statutory obligation to bargain collectively, the Act having been silent on that question. But here Congress specified the subject-matters on which collective bargaining was required, including "wages" and "conditions of employment."

\* See, *inter alia*, *U. S. Bureau of Labor Statistics Bulletins* cited in footnote 19, *supra*, Bulletin No. 686 (Union Agreement Provisions, 1942) pp. 194-201; The Department of Labor Publication, *Monthly Labour Review*, February 1947, pp. 141-214 ("Collective Bargaining Development in Health and Welfare Plans"); the study made by Baker and Dahl, *Group Health Insurance and Sickness Benefit Plans in Collective Bargaining* (Princeton Univ., 1945), and the study made by Robert J. Rosenthal, *Union-Management Welfare Plans*, pp. 64-94 of *Quarterly Journal of Economics*, November 1947 (Harv. Univ.).

ent, the actual negotiations may revolve around an operating pension insurance scheme covering employees variously represented in many units. But, as the Trial Examiner points out, the difficulties in such a case go to the question of what terms may be agreed upon practically in the course of bargaining, rather than to the question of whether any bargaining at all can take place.

Because the acts of the respondent, upon which the charge of unfair labor practices was based, occurred before August 22, 1947, when the statute was amended by the present Congress, we have so far only discussed the application of the original statute. The complaint, however, alleges, and the Trial Examiner has found, that respondent is *continuing* to engage in unfair labor practices; and the legal validity of this finding has also been placed in issue by the respondent. We must therefore determine whether, in reenacting and amending the statute, the present Congress either narrowed or broadened the scope of collective bargaining as conceived in 1935.

There is compelling evidence in the legislative history of the amended Act that the 80th Congress recognized that pension and retirement plans and other similar "welfare insurance" schemes fell within the meaning of the terms "wages or other conditions of employment" as written in 1935, and that it was willing to allow that conclusion to stand.

Thus, in the original bill introduced in the Senate by Senator Ball (S. 360, 93 Cong. Rec. 629), the phrase "other working conditions" was substituted for the phrase "other conditions of employment" which originally appeared in the Act. The distinction between the two phrases was discussed by various witnesses who appeared before the Senate Committee in charge of the bill. On this occasion, the Board's witness, in opposing the proposed change, stated:

"This might easily be construed to withdraw statutory protection from or to forbid bargaining with respect to pension plans, fines for work stoppages, welfare funds, use of union-labeled goods, hiring hall arrangements and other matters frequently not considered working conditions."

\* Hearings before the Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess. (1947), p. 1914.



On April 11, 1947, Senator Wagner brought this fact to the attention of the Senate in a statement in which he pointed out (93 Cong. Rec. 3427):

By substituting the narrower term "working conditions" for the present broader term "conditions of employment" the bill would narrow the scope of collective bargaining to exclude many subjects such as, perhaps, pension plans and insurance funds which properly belong in the employer-employee relationship and in regard to which the employer should not have the power of industrial absolutism.

The ensuing debate led to a *deletion* of the proposed words of limitation from the final bill that Senator Taft reported to the Senate on April 17, 1947 (S. 1126). In it, the phrase "conditions of employment" reappeared. It remained in the bill which eventually became the Act, as amended.

The original bill passed by the House and sent to the Senate (H. R. 2030; 93 Cong. Rec. 3747) excluded insurance and welfare plans from the scope of collective bargaining. The bill limited collective bargaining to:

(i) wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures and practices governing safety, sanitation, and protection of health in the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects (*ibid*).

On April 17, 1947, Representative Lodge offered an amendment to this section of the pending bill which would broaden its narrow definition of collective bargaining to include,

"pension plans, group insurance benefits, and hospitalization benefits." (93 Cong. Rec. 3712.)

In support of his amendment, Representative Lodge stated (*ibid.*):

... The purpose of this amendment is to minimize the interferences with collective bargaining which are implicit under the section to which this amendment applies. I regard such interferences with collective bargaining by the Government as unwarranted. These matters should be left for negotiation between labor and management.



Representative Madden, who spoke in favor of the amendment, stated (*ibid.*):

Bargaining on this type of welfare system is completely within the area of appropriate collective bargaining under the present provisions of the Act.

Representative Lodge's amendment was defeated (93 Cong. Rec. 3713). But the restrictive definition of collective bargaining contained in the original House bill was *eliminated* in the Senate-House Conference bill which passed the House on June 4, 1947 (93 Cong. Rec. 6549).

The language and the legislative history of Section 302 of the Act also reveal Congressional recognition of the demonstrable adaptability of the collective bargaining process to the establishment or control of industry-supported welfare schemes. It further discloses Congressional affirmation of the inclusion of such schemes within the statutory scope of collective bargaining.

Section 302 restricts employer payments to employee representatives. The proviso to subsection (c) of Section 302, however, permits, subject to various conditions, employer contributions to joint employer-union administered trust funds set up for the purpose of providing medical care, pensions and insurance for employees and their families. Congress recognized that many such funds had already been established by collective agreement prior to 1947 and accordingly, to prevent a retroactive application of the restrictions of Section 302 to funds already established, Congress provided in subsection (f) that Section 302 would not apply to any contract in force on the date of enactment of the Act, until the expiration of such contract or until July 1, 1948, whichever first occurred. In subsection (g) of Section 302, Congress further provided:

Compliance with the restrictions . . . upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by *collective agreement* prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits. (Italics supplied.)

We conclude, therefore, as did the Trial Examiner, that where, as here, the employees in an appropriate unit have designated an exclusive bargaining representative, the employer of such employees is under a statutory duty to bargain collectively with the accredited representative concerning the terms of a pension and retirement program.

**B. The respondent's alleged justification of its refusal to bargain with the Union.**

The respondent seeks to justify its failure to notify and to consult with the Union about the expansion of its pension undertaking in December 1945, and its refusal to entertain the Union's grievance about the application of the retirement rule and its effect upon the contract terms on more than its erroneous conception of a limited obligation under the Act. It also relies on the "management rights" clause in the contract and the Union's failure, when the collective contract was negotiated, either to protest or otherwise to seek to qualify the effect of the respondent's first expansion of the retirement insurance program. In other words, the respondent here asserts that the Union waived its right to negotiate about the pension plan or to protest any unilateral decisions as to the operation or scope of benefits of the pension-retirement program, at least for the duration of the contract.

The contract contained no specific waiver. The most that can be assumed from the Union's failure during the contract negotiations to bargain or affirmatively to evince an interest in the immediate negotiation of the retirement program, is that the Union acquiesced in the program as it existed before, and carried over that program into the contract year. Such "acquiescence," however, was given at a time when the separation-because-of-age policy was effective, if at all, only on a case-to-case basis, and when the Union contemplated subsequent negotiation—specifically delayed because of wartime conditions—of a severance pay structure that would undoubtedly have required the discussion of the retirement benefits then existing.<sup>7</sup> We cannot view this kind of "acquiescence"

<sup>7</sup> In the *Basic Steel* case, 19 W.L.B. 568 (in which the respondent and Union were parties) one of the issues submitted to the War Labor Board concerned the inclusion in collective agreements between em-

as constituting a waiver of the Union's right to insist on the maintenance of the *status quo* as it existed at the time of the contract, or of its right to seek an opportunity to bargain about reshaping the contractual relationship to the new economic conditions. Moreover, if respondent, in fact, had believed that the contract clauses or the Union's "acquiescence" relieved it from an obligation to recognize the Union's demands during the contract period, the merits of its position could have been established through the adjudicative procedure under the contract which the Union here sought to invoke.

As is pointed out more fully in the Trial Examiner's Intermediate Report, the Union, upon hearing of the respondent's unilateral determination to apply the separation-because-of-age policy on an automatic, rather than on a case-to-case basis, immediately sought to invoke the *grievance procedure*, claiming that automatic application of the policy was violative of the seniority and discharge notice provisions of the contract. The respondent foreclosed the use of the grievance procedure or any other avenue of approach to it, by announcing to the Union that important legal issues were involved which would have to be presented to the Board. The Union later discovered that respondent had also acted unilaterally in expanding its financial obligations under the pension pro-

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players in the basic steel industry and various locals of the United Steelworkers of America (CIO) of a severance pay structure designed, in part, to provide a monetary income for steelworkers who would become displaced at the time industrial operations would be reconverted from a wartime to a peacetime basis.

The War Labor Board, although declining to approve the severance pay structure submitted by the Union, approved the principle, and ordered the parties to negotiate within 60 days following the issuance of the directive order, for "reasonable" severance pay allowances appropriate for each plant through the procedures of collective bargaining. The directive order issued November 25, 1944, contained the following language (19 W.L.B. at 572) which was incorporated in the collective agreement of April 1945 together with a specific clause stating that the parties would negotiate about the matter at a later unspecified date:

Among the provisions which should be worked out through collective bargaining are those relating to the eligibility of employees, the amount of severance pay benefits, the circumstances under which the benefits should be paid, the transfer of employees to other suitable employment, the relation to existing pension and retirement plans, etc. (Emphasis supplied.)

gram so as to provide insuring benefits to employees without cost to them.

In any event, it is clear to us from the record that respondent failed and refused to bargain with the Union respecting the interpretation of the contract and the substantive matters of the pension program, and is continuing to fail and refuse to do so, because of its fixed view that the establishment and operation of such a program is a management function outside the scope of the collective bargaining rights granted employees under the Act. This is borne out by the oral argument in the instant case, where respondent's counsel asserted that the respondent had taken "great pains to avoid any discussion whatever at any collective bargaining meetings" concerning its pension and retirement policies, "and would have done so whenever the [Union] had brought it up, and will continue to do so until we are required to do otherwise." Thus, whether or not the contract in fact permitted respondent to refuse to bargain about the pension and retirement policies during its term is largely academic.<sup>2</sup> Moreover, that contract has since expired.

We find, as did the Trial Examiner, that the respondent has engaged, and is engaging in, violations of Section 8 (5) and (1) of the Act.

### **The Remedy**

Because the respondent has rigidly maintained, and is maintaining that its pension and retirement policies are not the subject of collective bargaining, but are a matter about which the respondent is free to act unilaterally, and because, as we have found, the respondent's unilateral action with respect to any aspects of its pension and retirement plan substantially affect the interest of the exclusive representative in the establishment of stable terms and conditions of employment ap-

<sup>2</sup> Even if we were to assume that, as the respondent contends, the contract gave respondent the privilege of dealing unilaterally with any aspect of its pension and retirement program during the term thereof, we are nevertheless convinced and find that the respondent's admitted rejection of the principle of collective bargaining as to pensions on grounds other than the contract is violative of the Act, in that it foreclosed bargaining for any agreement with respect to its pension policy, irrespective of the time at which such agreement might become effective.



plicable to the entire group, we find it necessary, in order to effectuate the policies of the Act, to require the respondent to refrain from making any unilateral changes with respect to its pension and retirement policies which affect any of the employees in the unit represented by the Union, without prior consultation with the Union; and in addition, to require it to bargain collectively with the Union upon request.

We agree with the Trial Examiner that it is not necessary, in order to effectuate the policies of the Act, to require the respondent to reinstate the retired employees with back pay. The merits of the Union's request for such reinstatement may well be determined through the procedures of collective bargaining which our order here assures the Union it may use, upon its meeting the conditions specified below.

The Union has not complied with the provisions of Section 9 (f), (g), and (h) of the amended Act. Our remedial order therefore shall be in part conditioned upon its complying with that section of the amended Act, within 30 days from the date of the order herein."

### ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the Act, as amended, the National Labor Relations Board hereby orders that the respondent, Inland Steel Company, and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO),\* with respect to its pension and retirement policies if and when said labor organization shall have complied within thirty (30) days from the date of this Order, with Section 9 (f), (g), and (h) of the Act, as amended, as the exclusive bargaining representative of all production, maintenance, and transportation workers in the respondent's Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office and salaried employees, brick-

\* *Matter of Marshall Bruce Company*, 75 N.L.R.B., No. 13.

Hereinafter called "the Union."



layers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen, and nurses;

(b) Making any unilateral changes, affecting any employees in the unit represented by the Union, with respect to its pension and retirement policies without prior consultation with the Union, when and if the Union shall have complied with the filing requirements of the Act, as amended, in the manner set forth above.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request and upon compliance by the Union with the filing requirements of the Act, as amended, in the manner set forth above, bargain collectively with respect to its pension and retirement policies with the Union as the exclusive representative of all its employees in the aforesaid appropriate unit;

(b) Post in conspicuous places throughout its plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, copies of the notice attached hereto marked Appendix A.\* Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof and maintained by it for thirty (30) consecutive days thereafter and also for an additional thirty (30) consecutive days in the event of compliance by the Union with the filing requirements of the Act as amended, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Thirteenth Region in writing, within ten (10) days from the date of this Order, and again within ten (10) days from the future date, if any, on which the respondent is officially notified that the Union

\* In the event that this Order is enforced by a decree of a circuit court of appeals, there shall be inserted before the words "A Decision and Order" the words "Decree of the United States Circuit Court of Appeals Enforcing."

has met the condition hereinabove set forth, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 12th day of April 1948.

Paul M. Herzog

*Chairman*

John M. Houston

*Member*

James J. Reynolds, Jr.

*Member*

Abe Murdock

*Member*

(SEAL)

## NATIONAL LABOR RELATIONS BOARD

### **J. COPELAND GRAY, MEMBER, dissenting:**

I dissent from the Order of the Board directing the respondent to bargain on a retirement program. I strongly believe that neither employers nor unions should be *required* by this Board to bargain collectively on a subject matter which has *not* become an industry or general business practice.

Research has disclosed no real practice of collective bargaining on retirement programs. Such statistics as are available on the subject, show that the installation of retirement programs is a management prerogative.\* In fact, in the instant case the respondent on its own initiative voluntarily planned and installed the retirement program in issue in 1936 and extended it in 1944, without any complaint at that time and for some time thereafter by the then existing duly constituted collective bargaining representative.

Contrary to the assertion in the opinion of the majority, there is no commonly known "practice of offering retirement benefits in lieu of current wage increases." The few isolated cases in which an employer *voluntarily* offered some retire-

\* In the approximately less than 5 percent of the industries covered, retirement programs have been generally unilaterally installed by employers. See, e.g., Survey by N.L.R.B. for Associated Industries of New York State in 1947; "Group Health Insurance and Sickness Benefit Plans in Collective Bargaining" by the Industrial Relations Section of Princeton University; and a recent study by the Bureau of National Affairs, Inc.

ment benefits as a *quid pro quo* for a union's concession on wage increases, can by no stretch of the imagination be construed as a "not uncommon practice." Indeed, union leaders themselves must have regarded retirement programs as falling outside the scope of collective bargaining. Thus, this is the first case involving an employer's duty to bargain on the subject to come before the Board since the passage of the Wagner Act in 1935. During the days of the War Labor Board, when union leaders extended their ingenuity to devise many types of fringe benefits to by-pass the "Little Steel Formula," which prohibited wage increases beyond 15 percent,<sup>22</sup> there were no general demands for retirement programs. If ever the time were ripe for unions to attempt to secure such benefits for their members through ~~compulsory~~ collective bargaining, it was when the War Labor Board was inclined to grant or to require collective bargaining on these fringe additions. Yet the union leaders and rank and file employees did not at this most propitious time generally think of retirement programs as a required subject matter for collective bargaining. And, as previously noted, in this very case the Union made no collective bargaining demands at the time when the respondent extended the retirement program and for some time thereafter.

That neither employers nor unions have regarded retirement programs as a *compulsory* subject for collective bargaining generally, is readily understandable from the complexities and confusions which would inevitably result from such a step. Let us assume the case of an employer who has contracts with five different unions covering different units of employees in the plant. The representatives of the five unions will be vying to outdo each other in the liberality of any retirement program under consideration. Add to this the lack, common to most people, of the specialized and technical knowledge of the actuarial requirements for sound retirement programs. Such conditions could only create chaos in the bargaining process.

<sup>22</sup> Among the fringe benefits obtained were increased vacation pay, increased or initial night shift premiums, increased or initial pay for holidays not worked, and increased or initial pay for recesses.

<sup>23</sup> Retirement programs should not be confused with dismissal pay, which is an entirely different type of grant.

Or, take for example, the employer who has already established a sound retirement program pursuant to collective bargaining with a union. At the end of the contract year, he may be faced with a demand by the same or a different bargaining agent to change the entire program, thereby completely upsetting the actuarial basis upon which the program had been planned. Demands for changes could continue at the end of each contract term. No business can function soundly on such a basis. These examples illustrate how impractical and infeasible it is to require collective bargaining concerning retirement programs *as a matter of law*.

I do not agree with the majority that, in enacting the Wagner Act, Congress intended to include retirement programs within the phrase "wages, hours, and working conditions," by its mere failure specifically to exclude it. In attempting to ascertain the Congressional intent *as it existed in 1935*, we must also consider the prevailing practice or lack of it with respect to retirement programs and the feasibility of bargaining collectively with respect to it. As I have already pointed out, there is not now, and certainly there was much less in 1935, any established practice of bargaining collectively for retirement programs and that such a practice was highly impractical and unworkable. In the light of the foregoing, I can only conclude that the Congress used the words "wages, hours, and working conditions" in the then existing normally accepted common usage of the terms. That did not include retirement programs.

In my view, the right of the employer to fix the age at which he may end the active employment of his employees, is just as much a prerogative of management as is his right to fix the age above the legal minimum at which he will hire people to work for him. Concededly, the establishment of a retirement program is a constructive step which may produce many benefits for the employees and the employer by way of reduced turnover, improved employee morale, and employer satisfaction that his superannuated employees will acquire some benefits. But our concern here is not to determine whether such objectives are desirable. If an employer, on his own initiative or pursuant to peaceful persuasion by a union, desires

to bargain with the union concerning the establishment of a retirement program, there is nothing to prevent him from doing so. I do not believe, however, that this Board is required to, and should, so interpret the statute as to *compel* the respondent to bargain on this subject matter.

I would dismiss the complaint.

Signed at Washington, D. C., this 12th day of April 1948.

J. Copeland Gray

*Member*

NATIONAL LABOR RELATIONS BOARD



## APPENDIX A

NOTICE TO ALL EMPLOYEES PURSUANT TO A  
DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees

WE WILL NOT refuse to bargain collectively with Local Unions Nos. 1010 and 64 of the United Steelworkers of America (CIO), as the exclusive representative of all of the employees in the bargaining unit described herein with respect to our pension and retirement policies, provided said labor organization complies, within thirty (30) days from the date of the aforesaid Order of the Board, with Section 9 (f), (g) and (h) of the National Labor Relations Act, as amended.

WE WILL NOT make any unilateral changes in our pension and retirement policies affecting any employees in the bargaining unit without prior consultation with the Union, provided said labor organization complies within thirty (30) days from the date of the aforementioned Order of the Board, with Section 9 (f), (g) and (h) of the National Labor Relations Act, as amended.

The bargaining unit is: all production, maintenance and transportation workers in our Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses.

INLAND STEEL COMPANY

(Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
TRIAL EXAMING DIVISION  
WASHINGTON, D. C.**

Case No. 13-C-2836

In the Matter of  
**INLAND STEEL COMPANY**  
and

**LOCAL UNIONS NOS. 1010 and 64, UNITED STEEL-  
WORKERS OF AMERICA (CIO)**

*Mr. Herman J. De Koven, for the Board.*

*Pope & Ballard, by Mr. Ernest S. Ballard, and Mr. Merrill Sheppard, of Chicago, Ill., and Mr. William G. Caples, of Chicago, Ill., for the Respondent.*

*Mr. Frank J. Donner, of Washington, D. C., for the Union.*

**INTERMEDIATE REPORT**

**Statement of the Case**

Upon a second amended charge filed on August 15, 1946, by United Steelworkers of America, on behalf of Local Unions Nos. 1010 and 64, herein called the Union, the National Labor Relations Board, herein called the Board, by its Acting Regional Director for the Thirteenth Region (Chicago, Illinois), issued its complaint dated August 19, 1946, against Inland Steel Company, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5), and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint accompanied by notice of hearing thereon were duly served upon the respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance that the respondent: (1) on December 31, 1945, put into effect a "past-service pension trust" plan

The correct name of the Union is as set forth above, in accordance with a stipulation of the parties.

for its employees, without first notifying and consulting with the Union and giving the Union an opportunity to bargain collectively concerning said pension trust plan, although a majority of the employees in an appropriate unit had designated and selected the Union as their representative for the purposes of collective bargaining; (2) on March 5, 1946, and thereafter, refused and failed to negotiate with the Union concerning a grievance presented by the Union, in which the Union protested the respondent's contemplated action of retiring employees in the unit who had reached age 65, and in which the Union stated that such action would constitute a breach of the existing contract between the respondent and the Union; (3) since on or about April 1, 1946, has retired employees in the unit who have reached age 65, and accorded them the right to receive certain benefits as retired employees, without first consulting with the Union and giving the Union an opportunity to bargain collectively concerning such matters; and (4) by the foregoing acts, has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The respondent, in its answer filed August 30, 1946, in effect admitted the allegations of the complaint as set forth above, alleged certain additional facts in relation thereto, and denied that by reason of any of such facts it had engaged in or was engaging in any unfair labor practices.

Pursuant to notice, a hearing was held on September 12, 1946, at Chicago, Illinois, before the undersigned, Sidney Lindner, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were represented at the hearing by counsel. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all parties. Toward the close of the hearing a motion of counsel for the Board to conform the pleadings to the proof was granted without objection. At the close of the hearing counsel for the Board and for the Union argued orally before the undersigned. Although advised of their opportunity to file a brief, or proposed findings and conclusions of law, or both,

only counsel for the respondent filed a brief with the undersigned.<sup>2</sup>

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

## **FINDINGS OF FACT**

### ***I. The business of the respondent***

Inland Steel Company, a Delaware corporation, maintains the principle office and place of business at Chicago, Illinois, and operates and maintains in addition to others, plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, which plants are herein collectively called the Plants. At its Indiana Harbor plant the respondent is engaged in the manufacture, sale, and distribution of semi-finished and finished steel products, pig iron, and coke. At its Chicago Heights plant the respondent is engaged in the manufacture, sale and distribution of merchant bars, concrete reinforcing steel bars, and steel fence posts.

The respondent, in the course and conduct of its business and in the operation of the Plants, annually purchase raw materials for use at the Plants valued in excess of \$5,000,000 of which more than 95 percent is shipped to the Plants from points outside the States of Indiana and Illinois. The respondent, in the course and conduct of its business and in the operation of the Plants, annually manufactures products at the Plants valued in excess of \$5,000,000, of which more than 75 percent is shipped to points outside the States of Indiana and Illinois. The respondent concedes that in its operation of the Plants, at all times material herein, it has been engaged in commerce within the meaning of the Act.

### ***II. The organization involved***

Local Union Nos. 1010 and 64, United Steelworkers of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondent at its Plants.

<sup>2</sup>After the receipt of the respondent's brief, counsel for the Board made a motion to be granted the right to file a reply brief. The motion was denied by the Chief Trial Examiner.

### **III. The unfair labor practices**

#### **A. The refusal to bargain**

##### **1. The appropriate unit and representation by the Union of a majority therein**

The undersigned finds in accordance with the stipulation entered into by and between the parties, that all production, maintenance, and transportation workers employed by the respondent at its Plants, excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen, and nurses, constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.

The undersigned further finds in accordance with such stipulation that Local Unions Nos. 1010 and 64, Steel Workers Organizing Committee, affiliated with the CIO, was certified by the Board on August 26, 1941, as the exclusive representative of the employees in the unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment,\* and it remained such exclusive representative of the employees in the unit until succeeded by the Union on May 23, 1942, the date on which Steel Workers Organizing Committee changed its name to United Steelworkers of America. That at all times since May 23, 1942, the Union has been the duly designated bargaining representative of a majority of the employees in the aforesaid appropriate bargaining unit, and that by virtue of Section 9 (a) of the Act, the Union was on May 23, 1942, and at all times thereafter has been and is now the exclusive representative of all employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

##### **2. The refusal to bargain**

There are no contested material issues of fact in this proceeding. The respondent does not deny that it failed and refused, and fails and refuses, to discuss with the Union the several matters embraced by the allegations of the complaint.



It defends its conduct in this respect on the grounds that the establishment of its Retirement Plan and Past Service Pension Trust Plan, collectively herein referred to as the Pension Plan, and the termination of employees pursuant to the terms of the Pension Plan are not proper subjects for collective bargaining; and that a so-called "management" clause in the current contract between the respondent and the Union has the effect of vesting exclusively in the respondent the right to establish a fixed retirement age, and to retire employees pursuant thereto.

The respondent's original Retirement Plan for its employees and the employees of its subsidiaries was put into effect on January 1, 1936, by the establishment of a contributory plan for the payment of retirement annuities pursuant to a contract between the respondent and the Equitable Life Assurance Society of the United States. Those eligible to participate in the original Retirement Plan were employees with earnings of \$250.00 or more per month, and membership in the plan was optional.

At the time the original Retirement Plan was put into effect, no collective bargaining agent had been certified at the Plants for the employees in the unit, and there had been no collective bargaining by the respondent with any representative of these employees. The first collective bargaining contract between the respondent and the Union was entered into on August 5,

This contract which was entered into by the parties on April 30, 1945, and amended February 16, 1946, recognized the Union as the exclusive bargaining representative of the employees in the unit heretofore found to be appropriate. The clause in question reads as follows:

#### **Article XI**

##### **Plant Management**

The management of the plants and the direction of the working forces, including the right to direct, plan and control, plant operations, the right to hire, promote, demote, suspend, and discharge employees for cause, and to relieve employees because of lack of work or for other legitimate reasons, and the right to introduce new and improved methods or facilities, and to change existing production methods or facilities and to manage the properties in the traditional manner, is vested exclusively in the Company, provided that nothing shall be used for the purpose of discrimination against employees because of membership in or activity on behalf of the Union. These provisions shall not apply to nullify the other provisions of this agreement.

1942. It provided for recognition of the Union as exclusive bargaining representative, a maintenance of membership clause with an escape period, and numerous other provisions with regard to wages, hours of work, vacations, and other matters not material here. No mention was made of the Retirement Plan in this contract.

On December 31, 1943, the Retirement Plan was amended and extended to cover all employees, regardless of the amount of their earnings, provided the employees who elected to participate in the plan had 5 years of service with the respondent or one of its subsidiaries, and had attained the age of 30.\*

On April 30, 1945, the respondent and the Union entered into a new collective bargaining contract, which is presently in force.\* This contract contained in addition to all of the provisions of the 1942 contract with variations, several new provisions among which were those dealing with "in-plant feeding," and "dismissal or severance pay." The Union and

\* According to the stipulation of the parties, the number of employees who elected to participate in the Amended Retirement Plan as of the dates indicated below, and the number of employees in the unit as of such dates, is as follows:

Date	Eligible Employees	Employees who elected to participate	No. of employees in unit
December 31, 1943	659	455	10,669
December 31, 1944	6,114	3,370	10,176
December 31, 1945	6,644	2,961	10,122
September 1, 1946	7,288	3,061	12,019

\* On February 16, 1946, the wage and termination clauses of the April 30, 1945, contract were amended and supplemented. In all other respects the April 30, 1945, contract remained in effect as written.

The particular section of the contract dealing with dismissal or severance pay is Article XVII, which sets forth that the Union and the respondent accept Section 5, of the Directive Order of the National War Labor Board dated November 25, 1944, in Case No. 111-6230-D (14-1 et al.). Under its terms, the respondent and the Union agree to negotiate with regard to severance pay of employees who were to be displaced as a result of the closing down of plants and facilities which had been built and technologically improved during the war, for the purpose of reducing the overall cost of production. In addition, the article recites that "Among the provisions which should be worked out through collective bargaining are those relating to the eligibility of employees, the amount of severance pay benefits, and circumstances under which the benefits should be paid, the transfer of employees to other suitable employment, the relation to existing pension and retirement plans, etc."

the respondent stipulated that in the negotiations between them leading to the execution of this contract, no mention was made of the age at which the respondent's employees should be retired, of the respondent's Retirement Plan, Amended Retirement Plan, or Pension Trust,\* of the benefits which should be available to employees on retirement, or any matter pertaining to any retirement or pension plan, or any other matter pertaining to the retirement of the respondent's employees. The parties further stipulated that no request has been made by either the Union or the respondent for collective bargaining pursuant to the final paragraph of Article XVII of the existing contract, referred to hereinabove in footnote 7.

On December 28, 1945, the respondent without first notifying or consulting with the Union, executed and established its Past Service Pension Trust, also referred to herein as the Pension Trust, which provides benefits for service of employees of the respondent and its subsidiaries rendered prior to the date when employees became eligible for benefits under the Retirement Plan and Amended Retirement Plan.\* According to the respondent, these were employees whose retirement date would occur so soon after they became eligible to participate in the Retirement Plan that it would not afford them the retirement annuity benefits intended. The Pension Trust was established by and under a trust agreement between the respondent and The First National Bank of Chicago as trustee. By its terms, employees are not required to contribute to the Pension Trust. With respect to compulsory retirement, the Pension Trust provides as follows: "Every employee over age sixty-five (65) on December 31, 1945, shall be retired by the Company or Subsidiary as of December 31, 1945. Every other employee shall be retired by the Board of

\* It should be noted that the Pension Trust, which will be discussed hereinafter, was not established by the respondent until December 28, 1945.

\* The number of employees in the unit who were covered under the provisions of the Pension Trust as of December 28, 1945, was 4,550. During the period between December 28, 1945, and September 1, 1946, an average of approximately 4,195 employees in the unit were within the coverage of the Pension Trust. The number of employees in the unit on December 28, 1945, was approximately 10,120, and the average number of employees in the unit during the period between December 28, 1945, and September 1, 1946, was 10,169.

Directors of the Company or Subsidiary on the January 1st nearest his sixty-fifth (65) birthday. The Company or Subsidiary, however, may for exceptional reasons from year to year request any retired employee to continue in employment beyond his retirement date. Notwithstanding the fact that an employee may continue in employment beyond such date, he shall be considered to be retired for the purposes of this Pension Trust on such date."

Between December 28, 1945, and February 22, 1946, the respondent announced to approximately 256 employees in the unit its intention to retire the said employees as of March 31, 1946, because they had reached age 65. The parties stipulated that during the period August 26, 1941, and April 1, 1946, the respondent by reason of the war emergency did not require or compel the retirement for age of any employee in the unit.<sup>10</sup>

On February 22, 1946 the Union filed a grievance with the respondent in which the Union protested the respondent's contemplated action of retiring its employees because they had reached age 65, and in which the Union stated that the automatic retirement of employees who reached age 65 would constitute a breach of the existing contract between the respondent and the Union.

At a meeting on March 5, 1946, the respondent notified the Union that it would not negotiate or deal with the Union concerning this grievance on the ground that the Union did not have the right to question the respondent's policies with respect to the retirement of its employees.

<sup>10</sup> Successive resolutions of the respondent's Board of Directors dated January 26, 1944, October 25, 1944, and January 25, 1945, referred to the continuing emergency and provided that employees whose names were certified by the respondent's president would be continued in active service for such period as he might determine, provided that such service should terminate on or before December 31, 1945. A further resolution of October 31, 1945, referred to the fact that though hostilities had ceased, an emergency still existed and in some cases peculiar circumstances made immediate retirement inadvisable from the standpoint of the respondent's operations. The president was authorized to defer the retirement of any employees in his discretion, with the proviso that in no event should such retirement be deferred beyond June 30, 1946. By April 1, 1946, all employees of the respondent and its subsidiaries who had reached the established retirement age of 65 had been retired.

Harry Powell, vice president of the Union and grievance committeeman, testified that after the refusal of the respondent to discuss the question of the retirement of 65-year-old employees, the meeting was adjourned and the Union's executive board met with Joseph Germano, district director of the United Steelworkers of America, as to the possible courses of action that the Union could take in this situation. Germano advised that the Union could strike or file an unfair labor practice charge with the Board. The executive board then recommended to the membership of the Union at a regular meeting, that they be empowered to take strike action in the event the respondent proceeded with its plan to compulsorily retire employees age 65 or over, which recommendation was accepted by the membership. Thereafter, the executive committee decided against strike action.

At a meeting between the respondent and the Union, held on March 25, 1946, the respondent reiterated its previous position regarding this grievance, and concluded the meeting with the statement that it would not discuss these matters further with the Union on the ground that, since certain legal issues were involved concerning an employer's obligations under the Act to bargain collectively on the subject of retirement of employees, the matters would have to be presented to the Board.

On April 1, 1946, and on various dates up to September 12, 1946, the respondent without first consulting with the Union, retired 224 named employees in the unit, because they had reached age 65, and accorded the said employees the right to obtain such benefits as retired employees as they would be entitled to under the Amended Retirement Plan and or the Pension Trust.

### CONCLUSIONS

The issue presented in this case, reduced to its essentials, is whether or not the requests of a duly designated bargaining representative, to discuss with an employer the projected retirement of a group of employees age 65 and over, under the terms of the employer's Pension Plan, comes within the recognized scope of collective bargaining, so that the refusal on



the part of an employer to negotiate with respect to the terms of its Pension Plan would constitute a violation within the meaning of Section 8 (5) of the Act. Inasmuch as the respondent contends that no matters relating to its Pension Plan come within the scope of collective bargaining, it is not sufficient to determine here whether the Union has the right to negotiate with respect to a single phase of the entire Pension Plan, but it becomes necessary in fact to determine whether pension plans in themselves fall within the scope of collective bargaining.

A review of the decisions of the Board and the courts indicates that no definitive exposition by competent authorities has ever laid down general principles which would facilitate the classification of matters sought to be negotiated and help to determine by rule of thumb whether certain demands of labor organizations do or do not fall within the proper scope of collective bargaining. Where this issue has arisen heretofore, it apparently has been treated on a case to case basis, so that over the years during which the Act has been administered, the subjects which more commonly are matters of concern between employers and their employees, have been held to fall within or without the scope of collective bargaining. A painstaking examination of the authorities fails to disclose any consideration of the issue here involved."

It is conceivable that the demands of employees may sometimes fall completely dehors the limits of employee interest. The Act, does not seek to encroach on those prerogatives of

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"The undersigned makes note however, that the War Labor Board considered cases involving retirement funds and issued directive orders thereon. In *American Locomotive Co.*, Case No. 111-12105-D, 2nd Regional Board, the majority opinion states:

"It is too well settled to admit of debate that a provision for employee retirement benefits constitutes a term and condition of employment, and, therefore, a valid subject of collective bargaining . . . It is apparent to us that the innovation, modification, or elimination of so important a condition of employment as a pension plan is properly a subject of collective bargaining. The absence of such provision in a trade union agreement does not preclude collective bargaining on the subject any more than the inclusion of such provisions in the agreement bars collective bargaining for its modification or elimination."

See also War Labor Board cases; *Pacific Telephone and Telegraph Company*, 111-12972-D; *Western Union Telegraph Company*, Case No. 388.

the employer which gives him a free hand to prosecute his business as he sees fit. Demands, therefore, which seek to restrict the employer in this right would clearly not be such as can reasonably fall within the scope of collective bargaining. Our system of free enterprise must necessarily protect the employer in enjoying what is commonly termed his "management prerogatives." True it is, that over the years during which the Act has been in existence, matters which formerly had been urged as purely "management prerogatives" were, by judicial and quasi-judicial opinion, held to be matters which employees had the right, in the interest of industrial stability, to seek to attain by peaceable negotiation. But there are undoubtedly broad areas of management interests which have been so readily accepted by labor as not to fall within the scope of their interests to negotiate, that few of these have had occasion to come within the purview of governmental agencies or the courts for determination.

It is well known however, that over the years of negotiations between unions and employers, the accepted subject matter of collective bargaining has expanded, so that presently various subjects which were formerly deemed to be reserved as "management prerogatives" are bargained about. Trade unions now commonly bargain about group insurance, hospitalization, and medical care.<sup>12</sup> The collective agreements entered into in the coal mining industry have included such matters as the condition of company houses rented by employees, the right of the union to participate in the choice of a surgeon for a company financed hospital, and measures to improve conditions affecting health, safety and welfare. In fact, in coal mining, the unions participate in the control of "all aspects of the productive process which affect the miner's opportunity to earn a living."<sup>13</sup>

<sup>12</sup> Lieberman, *The Collective Labor Agreement* (1939) 111-112, 131-133; Seidman, *The Needle Trades* (1942) 251, 269-270; U. S. Bureau of Labor Statistics, Bull. No. 686 (Union Agreement Provisions, 1942) 194-201; Bull. No. 393 (Trade Agreements, 1923 and 1924) 116; Bull. No. 448 (Trade Agreements, 1926) 181, 193; Bull. No. 468 (Trade Agreements, 1927) 193.

<sup>13</sup> Suffern, *The Coal Miner's Struggle for Industrial Status* (1926) 359, 376.

In the ladies' garment industry agreements with the union "specify the conditions under which an employer may reorganize his business, or enter into another partnership, or send materials to other firms for fabrication, or introduce a work-week as opposed to a piece-work basis of wage payments." "

In the current contract between the respondent and the Union herein, in addition to the regular features of wages, hours, and conditions of employment, provision is made for "In-Plant Feeding," with the Union having the right to advise and consult with the respondent concerning the provisions and maintenance of such service.

Indeed, in the men's and boys' clothing industry, the union and the employer's association recently announced<sup>18</sup> the completion of negotiations for an industry wide old-age pension plan for workers who have reached the age of 70 and have seen twenty years of service in the industry. The pension plan supplements a comprehensive system of life, health, accident, hospitalization, and maternity insurance already set up in the industry through collective bargaining, to all of which the entire contribution is made by the employers.

Does then the demand of the Union in the instant case to discuss the respondent's Pension Plan, come within the collective bargaining area, or is the Pension Plan within the field reserved strictly to management's sole consideration?

Considerable research on the economic character of pensions and the reasons for their existence has been conducted. J. H. Woodward expressed the employer's objectives and the considerations the employer expects and does receive by the establishment of a pension system as follows: "

The employer, however, necessarily looks upon a pension scheme as a business proposition. It is not his affair to correct the defects of human nature or remedy social shortcomings except insofar as his efforts are warranted

<sup>18</sup> Pierson, *Collective Bargaining Systems* (1942) 32; Carsel, *A Short History of the Chicago Ladies Garment Workers Union* (1940) 226-228; U. S. Bureau of Labor Statistics, Bull. No. 686 (Union Agreement Provisions, 1942) 214-216.

<sup>19</sup> See New York Times, December 2, 1946.

<sup>20</sup> From an address on the subject of industrial pensions before the Casualty Actuarial Society in November, 1919.

by an increased efficiency in his staff. For him the retirement system accomplishes the following:

- (a) It eliminates the cost of continuing on the pay-roll employees who are no longer active and who are therefore receiving, in the absence of any systematic plan, what in effect constitutes disguised pensions.
- (b) It enables the employer to get rid of inefficient employees whom he might otherwise hesitate to discharge.
- (c) It decreases his rate of labor turn-over.
- (d) It serves to attract to his employ thrifty and far-sighted men and to repel the more improvident who wish to be able to consume this entire income as it is earned.
- (e) It lessens unrest.
- (f) It makes certain, if soundly-constructed, that the cost of superannuation is assessed against the product at the time when it is incurred."

The Research Institute of America states that: "the pension plan is particularly adapted toward promoting labor stability; that is, reducing labor turnover. The reason is twofold: first, it provides a measure of security for the worker in his old age and thus reduces the internal pressure within the worker himself; second, since maximum benefits under the plan do not accrue to the employee until he reaches retirement age, there is a strong financial interest which deters the worker from switching jobs."

Thus it appears that pension plans are purely economic in nature, and all authorities agree that industrial pensions have their origin in certain definite problems faced by management, and constitute a means for meeting such problems. M. W. Latimer states the point as follows:

"... As the pension movement has spread, and as experience with the operation of the plans has become broader, the relief aspects have tended to decline in importance though perhaps never to disappear entirely, and economic motives have come more to the fore. Corporations at times have found it difficult, without some sys-

"See also Luther Conant, Jr., *"A Critical Analysis of Industrial Pension Systems"* (1922).

"Labor Coordinator, Vol. 3, *Pension Plans and Profit Sharing*, Research Institute of America, p. 78,008.

tematic methods of providing a continuing income, to eliminate promptly from their payrolls employees whose pay exceeds the value of their services." "

While industrial pension plans may vary as to their different features, such as contribution by both employee and employer, sole contribution by the employer," optional retirement benefits, and termination of service by death, nevertheless practically all pension plans, and particularly the respondent's Pension Plan, contain the basic elements of compulsory retirement, and retirement income. It is elementary that the lay-off of employees goes to the heart of the employer-employee relationship. It can hardly be debated that when an employee is compulsorily retired, he has for all purposes lost his job. Can a distinction be drawn between the loss of a worker's employment as a result of compulsory retirement and the termination of his employment because of other economic compulsion? Has not the retired employee lost his job just as effectively as has an employee who is discharged for cause or not for cause? Without question the conditions upon which a worker's employment may be terminated is a subject matter in which he has a vital interest and is a bargainable issue." It appears clear to the undersigned that the establishment of a working condition which limits the productive life of the employee, as in the instant case, his compulsory retirement at age 65, is a condition of employment, subject to collective bargaining, and the undersigned so finds.

The respondent contends that no industrial retirement annuity program can be effective and attain the purposes for which it is established unless a uniform fixed retirement age is included as a part of it and unless employees are in fact

" M. W. Latimer, *Industrial Pension Systems in the United States and Canada* (1932) p. 18.

" The respondent's Pension Plan was of the contributory and non-contributory types.

" Cf. *Matter of Timken Roller Bearing Co.*, 70 N.L.R.B. No. 39, where the Board held that the system of sub-contracting work may vitally affect employees by progressively undermining their tenure of employment and the refusal to negotiate with respect to this subject, claimed by the company to be a "management prerogative," was a violation of Section 8 (5) of the Act.



retired from the service at such age. Accepting this principle, it nevertheless does not relieve the respondent of the requirement to bargain with respect thereto, since as has been found above, the establishment of a compulsory retirement age is a condition of employment. This is particularly so, since as the respondent sets forth in its belief, quoting from Latimer,<sup>10</sup>

*"There is no fixed year of life in which men may be said to be unfit for work, even in a very definite occupation. This depends in part on the nature of their employment and in part on the special characteristics of the individual as related to general health and strength. Despite wide variations among individuals, however, it is possible to set an age above which few persons are able to perform a given kind of labor. Moreover, occurrences affecting the ability of any individual, which taken alone seems entirely fortuitous, assume a distinct pattern when considered in the mass and arranged in logical classification. While the incapacity of an individual may be accidental, the grouping and analysis of a body of such phenomena indicate that approximately a given number of persons will be disabled every year and that the total of these disabilities classified by age, sex, race, occupation, place of residence and so on does not vary widely from year to year."* (Italics supplied.)

Should then the employees not be heard through their duly chosen bargaining representatives, in an effort to make a determination jointly with the respondent on the issue regarding the age at which their jobs should be terminated? It should be borne in mind that the respondent is not compelled to reach an agreement with the Union on this issue. The requirement is that the respondent consult with the Union and explore in good faith the possibility of reaching an agreement so that, in conformity with the purposes of the Act, the matter may be moved, so far as is possible as a cause of industrial strike.<sup>11</sup>

Retirement income, the other basic component of a pension plan, has been characterized variously by students of pension

<sup>10</sup> See footnote 19, *supra*.

<sup>11</sup> As heretofore found, after the respondent refused to discuss the issue of the impending retirement of employees age 65 at a regular grievance meeting, the Union was authorized to strike but did not do so.

systems as rewards, bonuses, gratuities, deferred wages, etc. It is the contention of the respondent that pensions are not wages, deferred or otherwise, for the following reasons: (1) that since employee's wages are not decreased because his employer provides pensions, therefore pension payments cannot be considered deferred wages; and (2) a pension is neither a gift nor a wage, but rather a payment justified in part by the value to the employer of continuity of service of his employees, whereby an employer can make savings which are used to provide pensions. Counsel for the Board, on the other hand, urges that pensions are a form of wages and thus a direct subject for collective bargaining.

There is apparently no disagreement of the parties with the doctrine that a pension is a form of compensation paid to an employee in recognition of his service over a considerable number of years. The financial provision for such retirement payments is either contributed in whole or in part, by the employer during each year of service of the employee, and has been looked upon as a proper charge against production."

Thus, counsel for the respondent in his brief, quoting from a report on "Pensions" issued by the Department of Manufacture of the United States Chamber of Commerce states: "It is felt by many employers that the faithful service of an employee over a long period of years merits some tangible recognition. Long and faithful service in itself is thus considered to be of sufficient value to a company to warrant a reward by making financial provisions for the employee who has been worn out in its service."

In a similar vein, counsel for the Board in an economic study introduced in evidence recited the following:

The only really satisfactory way of providing pensions for employees is to set aside sums for the purpose whilst the men concerned are still on the active list. *After all, the pensions are earned during the working years of life, and not after retirement, and it is only reasonable to provide for the liability at the time it is incurred;*

<sup>24</sup> See *Why Pensions Pay*, Social Engineering Institute, Inc., Bulletin No. 1, 1927; See also A. D. Cloud, *Pensions in Modern Industry*, pp. 444-445.

not to do so can only mean that the profits shown as earned by the business are over-stated at the expense of the future. *Pension's should, therefore, be regarded as being in the nature of additional remuneration which is to be set aside to accumulate for the benefit of the staff until certain defined contingencies arise.*" (Italics supplied.)

The Encyclopaedia of the Social Sciences,<sup>2</sup> also cited by counsel for the Board in his economic study contains the following:

This doctrine considers a pension as compensation paid to the employee for the gradual destruction of his wage earning capacity in the course of his work. Retirement being a proper charge against the employee's entire period of active service, the employer should make contributions toward the employee's eventual retirement during each year of service of the employee, in a manner similar to that in which he annually sets aside a reserve against depreciation and obsolescence of his plant and machinery, *Pensions, according to this doctrine, are an absolutely indispensable complement of wages.* (Italics supplied.)

In the opinion of the undersigned, when a worker enters the employ of a company that has an established pension plan, he considers the plan as an integral part of his program of employment<sup>3</sup> and that his total compensation consists of two parts: wages while rendering services, and retirement payments after he has ceased active employment.<sup>4</sup> Although there are differences in terminology, in essence retirement payments are the result of earnings during one's active employment which accrue upon reaching a fixed retirement age, in which the employee has a strong financial interest during his working years. As such, the undersigned finds that re-

<sup>2</sup> H. H. Howards and R. Murrell, *Staff Pension Schemes*, London (1927), pp. 2.

<sup>3</sup> Volume 12, p. 67.

<sup>4</sup> See *Wilson v. Rudolph Wurlitzer Co.*, 48 Ohio App. 459, 194 N.E. 441, 443 (1934).

<sup>5</sup> Williston on Contracts, Revised Edition 1928 (Vol. 4, 2868-2869) states: "A promise to pay a 'retirement pension' is properly regarded as a promise for additional compensation."

retirement payments by whatever term they are described," are within the area of wages and properly are a subject for collective bargaining.

The respondent also urges that a plan for the retirement of its employees is one which as a matter of law resolves itself as a "management prerogative" and one in which its employees can have no legitimate interest. In support of this contention it points out that the language of Section 8 (5) and 9 (a) of the Act is taken from the similar language of Section 2 (First) of the Railway Labor Act of 1926;\* since at the time of the passage of the Railway Labor Act on May 20, 1926, at least 68 of the major Class I Railroads in the United States had pension plans in effect, which were established and maintained in existence, and administered unilaterally by the employer railroads without discussion or negotiation concerning them with any labor organization, and no labor organization either before or subsequent to the passage of the Railway Labor Act requested collective bargaining negotiations with any of the railroads concerning any of such plans; that on the date of the passage of the Railway Labor Act, 40 of the 47 railroads (including the Pullman Company) which had formal pension plans in effect on that date had established a compulsory retirement age for their employees and retired such employees upon their reaching such compulsory retirement age, and that no labor organization engaged in collective bargaining, or sought to bargain collectively concerning the establishment of a compulsory retirement age or the compulsory retirement of employees pursuant thereto, at or prior to or subsequent to the said date; that, therefore, the requirement of Section 2 of the Railway Labor Act, as to making and maintaining "agreements concerning rates of pay, rules, and working conditions," was not considered by Congress, by the railroads, or by the unions involved as embracing the making of agreements concerning pension

\* It is worthy of note that U. S. Bureau of Internal Revenue, *Regulations III (Current)*, Sec. 29.22 (a)-2, provide that retirement payments are income to the recipients and are classified as compensation for personal services and taxable as such.

\* 44 Stat. 577.



plans or the establishment of a compulsory retirement age or the retirement of employees on reaching that age. Even assuming *arguendo*, the validity of the respondent's contention as above set forth, the undersigned cannot conceive that thereby Congress intended to eliminate negotiations between employers and unions with respect to pension plans from the field of collective bargaining forever. Collective bargaining is not something which is static, but on the contrary is dynamic. As pointed out heretofore, the accepted subject matter of collective bargaining has expanded over the years of negotiations between employers and unions. The fact is as the Supreme Court pointed out in *Order of Railroad Telegraphers v. Railway Express Agency*:<sup>31</sup>

*Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States. From the first the position of labor with reference to the wage structure of an industry has been much like that of the carrier's about rate structures. It has insisted that exceptional situations often have an importance to the whole because they introduce competitions and discriminations that are upsetting to the entire structure. Hence effective collective bargaining has been generally conceded to include the right of the representative of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions. (Italics supplied.)*

It is accordingly clear, from these and other authorities, that the argument here advanced by the respondent is without merit and the undersigned so finds.<sup>32</sup>

The respondent further contends that the requirement of collective bargaining which calls for a contract for a fixed term, normally of one year, is inconsistent with, and precludes, collective bargaining concerning pension programs

<sup>31</sup> 321 U.S. 342.

<sup>32</sup> For a fuller discussion of the obligation imposed upon employers to bargain collectively, and the scope of collective bargaining as interpreted by the Supreme Court and the Circuit Courts of Appeals, see Weyand, *Majority Rule in Collective Bargaining*, 45 Columbia Law Review, 556.



which are established as long range projects; and since the respondent has contracts with 23 different collective bargaining agencies, to require it to renegotiate the provisions of its Pension Plan each year would destroy any possibility of consistency, permanence and uniformity, would inevitably result in discriminations among employees in different bargaining units of the respondent and its subsidiaries, and render it as a practical matter a question of very grave doubt whether any pension program could be maintained at all under such circumstances of conflict and uncertainty. The mere fact that the respondent anticipates difficulty about future bargaining in this area because of the multiplicity of the collective bargaining agencies and the various bargaining units they represent, does not render the respondent immune from its obligation, particularly since as found above, pension plans are properly within the scope of collective bargaining. It is not beyond the realm of possibility, that all of the collective bargaining agencies with whom the respondent has contracts would be willing to meet at a general meeting to discuss jointly the provisions of its Pension Plan with the respondent, since all of the workers represented by collective bargaining agents are similarly affected by its terms and provisions. Furthermore, as heretofore noted, nothing in the Act compels the respondent to reach an agreement with any of the collective bargaining agents on this issue. The requirement is that the respondent discuss the issue and explore in good faith the possibility of reaching an agreement. The undersigned finds this contention without merit.

The respondent's contention that Article XI the "management clause" of its existing contract with the Union has the effect of vesting exclusively in it the right to establish a fixed retirement age, and to retire employees pursuant thereto, is without merit. In the *Timkin Roller Bearing Co., case*,<sup>\*</sup> the Board had under consideration a "management clause" practically identical with the clause in the instant case, and the contention that such a clause relieved the Company of the necessity for bargaining with Union as to such matters which may

<sup>\*</sup> 70 N.L.R.B. No. 39.

come under a broad interpretation of this clause. The Board held as follows:

Without discussing whether or not more specific language in the contract would have given the respondent the right to refuse to bargain as to such matters as are found to be violations of Section 8 (5) herein. . . . the "management clause" as presently written cannot in any event properly be construed to cover the situation here for the reason that it is not specific but is, on the contrary, vague and uncertain. To construe the phrases "management of the works" and "direction of the working forces" as a grant of power to the respondent unilaterally to change the working conditions or hours of employment, would make a nullity of Section 8 (5) of the Act. It cannot be supposed that the Union relinquished its right, granted by the Act, to bargain for the employees at any time by such language as this.

Counsel for the Board raised the contention during oral argument that the failure of the respondent to negotiate the Union's claim that the existing contract between the respondent and the Union was breached because of the automatic retirement of employees who reached age 65, was in and of itself a violation of Section 8 (5) of the Act. Without determining whether or not the contract was breached, it nevertheless was incumbent upon the respondent to listen to the Union's contention with an open mind and to discuss it with a view to arriving at an amicable understanding if there was a basis therefor.

The Board has frequently held "

that the execution of a collective contract does not end the process of collective bargaining, and that the interpretation and administration of a contract already made and the settlement of disputes arising under any such contract, are properly regarded as within the sphere of collective bargaining.

That collective bargaining does not end with the signing

<sup>\*</sup> *Matter of Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, at p. 706. See also, *Matter of Rapid Roller Co.*, 33 N.L.R.B. 557; *Matter of Carroll's Transfer Company*, 36 N.L.R.B. 935; *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981; *Matter of U. S. Automatic Corp.*, 57 N.L.R.B. 24; *Matter of The Alexander Milburn Co.*, 62 N.L.R.B. 482; *Matter of Timken Roller Bearing Company*, 70 N.L.R.B. No. 39.

of a contract has been held by the Supreme Court in the *Sands* case,\* where the Court said:

The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employees to bargain collectively with their employers to the end that employment contracts binding on both parties should be made. But we assume that the Act imposes upon the employer the further obligation to meet and bargain with his employee's representatives respecting proposed changes of an existing contract and also to discuss with them its interpretation, if there is any doubt as to its meaning.

In the *Newark Morning Ledger* case,\*\* the Circuit Court of Appeals for the Third Circuit said:

... it may at any time become desirable or indeed necessary to bargain collectively for the modification of an existing collective agreement which has proved in practice to be in some respects unfair or unworkable or for the adjustment of complaints or alleged violations of such an agreement. Collective bargaining is thus seen to be a continuing and developing process by which, as the law now recognizes, the relationship between employer and employee is to be molded and the terms and conditions of employment progressively modified along lines which are mutually satisfactory to all concerned. It is not a detached or isolated procedure which, once reflected in a written agreement, becomes a final and permanent result.

The authority of the Union to represent the employees stems from the fact of its majority status, and is statutory rather than contractual in character. The choice of a bargaining agent by a majority of the employer's employees does not in and of itself require that the employer make any change in wages, or other conditions of employment. However, after the advent of a collective bargaining representative, unilateral action by the employer taken without consultation with the bargaining agent, on any matter relating to wages or conditions of employment, as in the instant case, the execution and

\* *N.L.R.B. v. Sands Mfg. Co.*, 306 U.S. 332.

\*\* *National Labor Relations Board v. Newark Morning Ledger Co.*, 120 F. (2d) 262 (C.C.A. 3); cert. denied 314 U.S. 692.

establishment of the Past Service Pension Trust and the retirement of employees who had reached age 65, becomes proscribed. The collective bargaining process following certification of the bargaining representatives, is analagous to the governmental process. In *Steele v. Louisville & Nashville R. R. Co.*,<sup>1</sup> the Court held, with respect to the Railway Labor Act:

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body to create and restrict the rights of those whom it represents. . .

Instead of performing only the limited function of fixing the rules governing employment as the respondent views it, collective bargaining has come to mean a system whereby employees participate through democratically chosen representatives in the control of their conditions of employment, not merely in making the rules but in their interpretation and execution. The substitution of this process for direct negotiations between employer and individual employees establishes in the plant a form of industrial democracy, paralleling and implementing the political democracy which the employee enjoys outside the plant. That the establishment of working conditions in industry is, after the advent of the collective bargaining representatives, essentially a governmental process was noted by the Court in *National Labor Relations Board v. Highland Park Mfg. Co.*,<sup>2</sup> where it was held:

The purpose of the written trade agreement is, not primarily to reduce to writing settlements of past differences, but to provide a statement of principles and rules for the orderly government of the employer-employee relationship in the future. The trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee

<sup>1</sup> 323 U.S. 192.

<sup>2</sup> 110 F. 2d 632 (C.C.A. 4).



is to be conducted. Wages may be fixed by such agreements and specific matters may be provided for; but the thing of importance is that the agreement sets up a *modus vivendi*, under which employer and employee are to carry on. It may be drawn so as to be binding only so long as both parties continue to give their assent to it; but the mere fact that it provides a framework within which the process of collective bargaining may be carried on is of incalculable value in removing the causes of industrial strife. If reason and not force is to have sway in industrial relationships, such agreements should be welcomed by capital as well as by labor. They not only provide standards by which industrial disputes may be adjusted, but they add dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry subject to the arbitrary power of the employer.

The undersigned finds that the respondent, by unilaterally executing and establishing its Past Service Pension Trust without first notifying and consulting with the Union, by refusing to negotiate with the Union on March 5, 1946, and thereafter, concerning a grievance in which the Union protested the contemplated action of the respondent of retiring employees in the unit who had reached age 65, which action the Union stated would constitute a breach of its existing contract; and by retiring employees in the unit who had reached age 65, without first consulting with the Union and by refusing to discuss the matter with the Union, has failed and refused to bargain collectively, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

#### ***IV. The effect of the unfair labor practices upon commerce***

The undersigned finds that the activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### ***V. The remedy***

Since it has been found that the respondent has engaged



in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the respondent by acting unilaterally with regard to its Pension Plan and without consulting with the Union on this subject, has refused to bargain collectively. It is accordingly necessary, in order to effectuate the policies of the Act, to require the respondent upon request, to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit with respect to its Pension Plan, and to refrain in the future from acting unilaterally in any matter involving its Pension Plan whereby employees in the appropriate unit may be substantially affected without prior consultation with the Union and the undersigned will so recommend.\*

Because of the basis of the respondent's refusal to bargain as indicated in the facts found and because of the absence of any evidence that danger of other unfair labor practices is to be anticipated from the respondent's conduct in the past, the undersigned will not recommend that the respondent cease and desist from commission of any other unfair labor practices. Nevertheless, in order to effectuate the policies of the Act, the undersigned will recommend that the respondent cease and desist from the unfair labor practices found, and from in any manner interfering with the efforts of the Union to bargain collectively with it."

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

\* Counsel for the Board and for the Union during oral argument raised the contention that the Board should, in addition to ordering the respondent to bargain collectively with the Union on all matters pertaining to its Pension Plan, order the respondent to reinstate with back pay all employees who were unilaterally retired, or in the event the Board is unwilling to so order, then to order that any agreement which is reached between the parties after bargaining collectively be made retroactive to the date on which the employees were in fact retired. The undersigned does not believe in view of the limited type of violation of Section 8 (5) herein found, that the aforesaid suggested remedy is in order. It is a matter however, that could be determined in the collective bargaining process.

\* See *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426.

### Conclusions of Law

1. Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO), is a labor organization within the meaning of Section 2 (5) of the Act.

2. All production, maintenance, and transportation workers employed by the respondent at its plant at Indiana Harbor, Indiana, and Chicago Heights, Illinois, excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses, constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.

3. Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO) was, on May 23, 1942, and at all times thereafter has been, the exclusive representative of all the employees in such unit for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing to bargain collectively with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO), as exclusive bargaining representative of the employees in the appropriate unit, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

5. By said acts, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

### RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, Inland Steel Company, its officers, agents, successors, and assigns, shall:

1. *Cease and desist from:*

(a) Refusing to bargain collectively with respect to its Pen-

sion Plan with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO) as the exclusive representative of all production, maintenance and transportation workers in the respondent's Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses;

(b) Unilaterally making changes in its Pension Plan which would substantially affect the employees in the aforesaid appropriate unit without prior consultation with Local Unions Nos. 1010 and 64, United Steel Workers of America (CIO);

(c) In any manner interfering with the efforts of Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO) to bargain collectively with it:

*2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:*

(a) Upon request, bargain collectively with respect to its Pension Plan with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO), as the exclusive representative of all the employees in the aforesaid unit;

(b) Consult with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO), prior to taking any action substantially affecting any employees in the appropriate unit, in accordance with the terms and provisions of its Pension Plan.

(c) Post at its plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, copies of the notice attached to the Intermediate Report herein marked "Appendix A". Copies of said notice to be furnished by the Regional Director for the Thirteenth Region shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced or covered by any other material;

(d) File with the Regional Director for the Thirteenth Region, on or before ten (10) days from the date of the receipt of this Intermediate Report, a report in writing setting forth in detail the manner and form in which the respondent has complied with the foregoing recommendations.

It is further recommended that unless the respondent notifies said Regional Director in writing within ten (10) days from the receipt of this Intermediate Report that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 203.39 of the Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946, any party or counsel for the Board may, within fifteen (15) days from the date of service of the order transferring the case to the Board pursuant to Section 203.38 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof; and any party or counsel for the Board may, within the same period, file an original and four copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.65. As further provided in said Section 203.39, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

Sidney Lindner  
Trial Examiner

Dated: January 8, 1947.

**"APPENDIX A"****NOTICE TO ALL EMPLOYEES PURSUANT TO THE  
RECOMMENDATIONS OF A TRIAL EXAMINER**

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify all employees that:

WE WILL bargain collectively upon request with Local Unions No. 1010 and 64, UNITED STEELWORKERS OF AMERICA (CIO), as the exclusive representative of all the employees in the bargaining unit described herein with respect to the Retirement and Pension Plans and WE WILL NOT in the future unilaterally make changes in our Retirement and Pension Plan which would substantially affect the employees in the bargaining unit described herein without prior consultation with the above-named Union.

WE WILL NOT in any manner interfere with the efforts of the above-named Union to bargain with us.

The bargaining unit is all production, maintenance, and transportation workers in our Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses.

**INLAND STEEL COMPANY**  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.



**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Case No. 13-C-2836

In the Matter of  
**INLAND STEEL COMPANY**  
and  
**LOCAL UNIONS NOS. 1010 and 64, UNITED STEEL-  
WORKERS OF AMERICA (CIO)**  
**RETURN BY UNITED STEELWORKERS OF AMERICA  
TO CONDITIONAL ORDER OF NATIONAL LABOR  
RELATIONS BOARD**

1. Upon the basis of an amended charge filed on August 15, 1946, by United Steelworkers of America on behalf of Local Unions Nos. 1010 and 64 (hereinafter called the Union), the National Labor Relations Board (hereinafter called the Board), issued its Complaint dated August 19, 1946, against Inland Steel Company, alleging that the Company had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act (hereinafter called the Act).

2. On January 8, 1947, Trial Examiner Sidney Lindner issued his Intermediate Report finding that the Company had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action.

3. On August 22, 1947, there became effective certain amendments to the Act.

4. The Act as amended contains certain provisions in Section 9 (f), (g) and (h) thereof. These provisions state:

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such

labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by

paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

5. On April 12, 1948, the Board issued and sent to the parties by mail its Decision and Order in the above case. Said Decision and Order contains the following statement:

"The Union has not complied with the provisions of Section 9 (f), (g), and (h) of the amended Act. Our remedial order therefore shall be in part conditioned upon its complying with that section of the amended Act, within 30 days from the date of the order herein."

6. Section 203.86 of the Board's Rules and Regulations, Series 5, effective August 22, 1947, provides as follows:

*"Time: additional time after service by mail.—In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run, is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event, the period runs until the end of the next day, which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half-holiday shall be considered as other days and not as a holiday. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."*

7. The Union has complied with Sections 9 (f) and (g) of the Act as amended within the time limitations prescribed in the Board's Decision and Order of April 12, 1948, and its Rules and Regulations. The Union has not complied with the requirements of Section 9 (h) of the Act as amended for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional and void. Said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution, for the following reasons:

(a) Section 9 (h) of the National Labor Relations Act, as amended, abridges the rights of the Union's officers to freedom of speech, press and assembly in violation of the First Amendment.

(b) Section 9 (h) of the National Labor Relations Act, as amended, abridges the right of the members of the union to elect officers of their own choosing and interferes with the right of freely elected officers of the Union to function on behalf of the membership by imposing a political test on such officers, thus impairing the right of free assembly in violation of the First Amendment.

(c) Section 9 (h) of the National Labor Relations Act, as

amended, is vague, indefinite and uncertain and prescribes no ascertainable standard of conduct so that any officer of the Union who is required to execute the affidavit under said section is afforded no reasonable means to avoid prosecution under Section 35 A of the Criminal Code.

(d) Section 9(h) of the National Labor Relations Act, as amended, imposes an unreasonable restriction upon the exercise of the rights of free speech and assembly by the officers and members of the Union, in that it compels the loss of valuable property and other rights as a condition to the exercise of the rights of free speech and assembly, in violation of the First Amendment and the due process clause of the Fifth Amendment.

(e) Section 9 (h) of the National Labor Relations Act, as amended, abridges the right of the officers of the Union to engage in political activity, a right reserved to the people by the Ninth and Tenth Amendments.

(f) Section 9 (h) of the National Labor Relations Act, as amended, applies only to labor organizations and not to employers. This constitutes an arbitrary discrimination against labor organizations, their officers and members, in violation of the Fifth Amendment.

(g) Section 9 (h) of the National Labor Relations Act, as amended, constitutes a bill of attainder in violation of Article I, Section 9 (3) of the Constitution of the United States.

NOW, THEREFORE, by reason of the foregoing the Union has complied with all of the legal conditions prescribed in the Board's Decision and Order of April 12, 1948.

The Union therefore respectfully requests that the Board now make its Decision and Order of April 12, 1948, unconditional in form and effect on the ground that the Union has complied with all of those provisions of Section 9 of the National Labor Relations Act, as amended, which are not illegal or unconstitutional.

Respectfully submitted,

ARTHUR J. GOLDBERG,  
General Counsel,

United Steelworkers of America and  
Local Unions Nos. 1010 and 64.



**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**Case No. 13-C-2836**

**In the Matter of  
INLAND STEEL COMPANY  
and**

**LOCAL UNIONS NOS. 1010 and 64, UNITED STEEL-  
WORKERS OF AMERICA (CIO)**

Service of original and six counterparts of Return of United Steelworkers of America to Conditional Order of National Labor Relations Board is hereby acknowledged, this 14th day of May, 1948.

**(s) FRANK M. KLEILER,  
Executive Secy., N.L.R.B.**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Case No. 13-C-2836

In the Matter of  
**INLAND STEEL COMPANY**  
and  
**LOCAL UNIONS NOS. 1010 and 64, UNITED STEEL-  
WORKERS OF AMERICA, CIO**

**ORDER**

On April 12, 1948, the National Labor Relations Board issued a Decision and Order in this case, finding that the respondent, Inland Steel Company, had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the National Labor Relations Act. The Board ordered the respondent to cease and desist from said unfair labor practices and to take appropriate affirmative remedial action, but conditioned this Order upon compliance by the Union<sup>1</sup> which had filed the charges, within 30 days from the date of the Order, with the requirements of Section 9 (f) (g) and (h) of the Act as amended.

Thereafter, on May 7, 1948, the Union requested an extension of the conditional portion of the Board's Order, alleging that the question of compliance with the requirements of Section 9 (f) (g) and (h) was to be submitted to the convention of the United Steelworkers of America. The Board has duly considered the matter. It believes that insufficient reason has been shown for granting the requested extension. The request is accordingly denied.

On May 14, 1948, the Union filed with the Board a document entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board." So far as here material, the Union alleges that it has complied with

<sup>1</sup> Local Unions Nos. 1010 and 64, United Steelworkers of America, affiliated with the Congress of Industrial Organizations. See *Matter of Marshall & Bruce Company*, 75 N.L.R.B. 90.

the requirements of Section 9(f) and (g) of the Act as amended within the time limitation prescribed by the Board's Decision and Order and the Rules and Regulations of the Board, and that it has not complied with the requirements of Section 9(h) of the Act as amended for the sole reason that the provisions of Section 9(h) are illegal, unconstitutional, and void, in that, in specified respects they violate Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution. Asserting that it has thus complied with all the legal conditions prescribed in the Board's Decision and Order of May 12, 1948, the Union requests that the Board now make its said Order unconditional.

Upon due consideration of the matter, the Board believes that the Union's request for an amendment rendering the Board's Order unconditional must be, and it hereby is, denied. In the absence of authoritative judicial determination to the contrary, the Board assumes the constitutional validity of the provisions of the amended act.<sup>1</sup>

Dated at Washington, D. C., this 17th day of May, 1948.

By order of the Board.

Frank M. Kleiler,  
*Executive Secretary.*

<sup>1</sup> See *Matter of Rite-Form Corset Company, Inc.*, 75 N.L.R.B. 174; *National Maritime Union v. Herzog, et al.*, U. S. District Court for District of Columbia, decided April 13, 1948.

[fol. 388] [Stamp:] Office of the Clerk, Supreme Court, U. S.  
Nov. 12, 1948

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the seventh day of October, in the Year of our Lord one thousand, nine hundred and forty-seven, and of our Independence the one hundred-seventy-second:

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent,

UNITED STEEL WORKERS OF AMERICA, C.I.O., et al., Intervenor-Respondents

No. 9634

UNITED STEEL WORKERS OF AMERICA, C.I.O., et al.,  
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

On petitions for review of Orders of the National Labor Relations Board.

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[fol. 389] And on April 30, 1948, there was filed in case No. 9612 a Petition of Inland Steel Company to Review and Set Aside an Order of the National Labor Relations Board, which said Petition to Review appears on pages 1 to 45 inclusive of the Appendix to Petitioner's brief in No. 9612 filed on June 26, 1948, and which is certified herewith.

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And afterwards, to-wit, on the ninth day of June, 1948, there was filed in case No. 9634 a Petition of United Steel Workers of America, C. I. O., et al. for Review of Orders of the National Labor Relations Board, Motion to Inter-

vene and Consolidate cases, which said petition for review, etc., is in the words and figures following, to-wit:

[fol: 390] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

No. 9634

UNITED STEELWORKERS OF AMERICA, CIO, by its President Philip Murray; Local Unions Nos. 1010 and 64, United Steelworkers of America, CIO, and Members of the United Steelworkers of America, CIO, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petition for Review of Orders of the National Labor Relations Board, Motion to Intervene and to Consolidate Cases

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

United Steelworkers of America, CIO, by its President Philip Murray; Local Unions Nos. 1010 and 64, United Steelworkers of America, CIO and Members of the United Steelworkers of America, CIO, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C.A., secs. 141, et seq. (Sup. July, 1947)) (hereinafter called the Act), believing themselves to be aggrieved by certain final orders of the National Labor Relations Board (hereinafter called the Board), entered on April 12, 1948 and May 17, 1948, respectfully petition this Court to review these orders. The proceeding resulting in said orders is known upon the records of the Board as "In the Matter of Inland Steel Company and Local Union Nos. 1010 and 64, United Steelworkers of America, (CIO), Case No. 13-C-2836."

1. Petitioners are and at all times mentioned herein have been an international labor organization admitting to membership all working men and working women employed in and around iron, steel and aluminum manufacturing, processing and fabricating mills and factories in the United States, Canada and Newfoundland; its president; two local unions affiliated therewith, Local Unions Nos. 1010 and 64,



labor organizations admitting to membership employees in the plants of the Inland Steel Company at Indiana Harbor, [fol. 391] Indiana, and Chicago Heights, Illinois, and the members of said International Union, including the members of Local Unions Nos. 1010 and 64. At all times material herein, the United Steelworkers of America and Local Unions Nos. 1010 and 64 (hereinafter collectively referred to as the Union) have been the representative for the purposes of bargaining collectively with the Inland Steel Company with respect to rates of pay, wages, hours of employment and other conditions of employment, for the employees of the Inland Steel Company in its plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.\*

2. The respondent Board is a public agency created by the Act, with its principal office in Washington, D. C. The members of said Board were, at the time of the entry of said orders of April 12, 1948 and May 17, 1948, Paul M. Herzog, Chairman, John M. Houston, James J. Reynolds, Jr., Abe Murdock and J. Copeland Gray.

3. Upon the basis of an amended charge filed on August 16, 1946, the Board issued its complaint dated August 19, 1946, against Inland Steel Company, alleging that the Company had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(1) and (5) and Section 2(6) and (7) of the Act, at the Company's plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois.

4. By reason of the matters alleged in paragraphs 1, 2 and 3 hereof, this Court has jurisdiction of this petition, pursuant to Section 10 (f) of the Act (29 U. S. C. A., sec. 160(f)).

5. On January 8, 1947, Trial Examiner Sidney Lindner issued his Intermediate Report finding that the Company had engaged in and was engaging in certain unfair labor

\* Throughout this petition we conform to the practice of the Board in its Decision and Order and refer to the sections of the Act as they were designated prior to the amendment of the Act.

practices and recommending that it cease and desist therefrom and take certain affirmative action, including bargaining collectively upon request with the Union as the exclusive representative of all the employees in the appropriate bargaining unit and consulting with the Union prior to taking any action substantially affecting any employees in the appropriate unit, in accordance with the terms and provisions of its pension plan.

6. On August 22, 1947, there became effective certain amendments to the Act.

[fol. 392] 7. The amended provisions of the Act include Section 9(f), (g), and (h) thereof (29 U. S. C. A., sec. 159 (f), (g) and (h)). These provisions state:

“(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

“(1) the name of such labor organization and the address of its principal place of business;

“(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

“(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

“(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

“(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

“(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

“(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

“(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

“(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization

unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

[fol. 393] "(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

8. On April 12, 1948, the Board issued and sent to the parties by mail its Decision and Order. Said Decision and Order contained (at p. 14) the following statement:

"The Union has not complied with the provisions of Section 9 (f), (g) and (h) of the amended Act. Our remedial order therefore shall be in part conditioned upon its complying with that section of the amended Act, within 30 days from the date of the order herein."

9. The Order of the Board provides as follows:

"Upon the entire record in the case, and pursuant to Section 10 (c) of the Act, as amended, the National Labor Relations Board hereby orders that the respondent, Inland Steel Company, and its officers, agents, successors and assigns, shall:

"1. Cease and desist from:

(a) Refusing to bargain collectively with Local

Unions Nos. 1010 and 64, United Steelworkers of America (CIO), with respect to its pension and retirement policies if and when said labor organization shall have complied within thirty (30) days from the date of this Order, with Section 9 (f), (g) and (h) of the Act, as amended, as the exclusive bargaining representative of all production, maintenance, and transportation workers in the respondent's Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen, and nurses;

(b) Making any unilateral changes, affecting any employees in the unit represented by the Union, with respect to its pension and retirement policies without prior consultation with the Union, when and if the Union shall have complied with the filing requirements of the Act, as amended, in the manner set forth above.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request and upon compliance by the Union with the filing requirements of the Act, as amended, in the manner set forth above, bargain collectively with respect to its pension and retirement policies with the Union as the exclusive representative of all its employees in the aforesaid appropriate unit;

(b) Post in conspicuous places throughout its plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, copies of the notice attached hereto marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof and maintained by it for thirty (30) consecutive days thereafter and also for an additional thirty (30) consecutive days in the event of compliance [fol. 394] by the Union with the filing requirements of the Act as amended, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the re-



spondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Thirteenth Region in writing, within ten (10) days from the date of this Order, and again within ten (10) days from the future date, if any, on which the respondent is officially notified that the Union has met the condition hereinabove set forth, what steps the respondent has taken to comply herewith."

10. The notice required by the Order to be posted by the Inland Steel Company is as follows:

Notice to All Employees

Pursuant to

A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees

We will not refuse to bargain collectively with Local Unions Nos. 1010 and 64 of the United Steelworkers of America (CIO), as the exclusive representative of all of the employees in the bargaining unit described herein with respect to our pension and retirement policies, provided said labor organization complies, within thirty (30) days from the date of the aforesaid Order of the Board, with Section 9 (f), (g) and (h) of the National Labor Relations Act, as amended.

We will not make any unilateral changes in our pension and retirement policies affecting any employees in the bargaining unit without prior consultation with the Union, provided said labor organization complies within thirty (30) days from the date of the afore-mentioned Order of the Board, with Section 9 (f), (g) and (h) of the National Labor Relations Act, as amended.

The bargaining unit is: all production, maintenance and transportation workers in our Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, time-

keepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses.

Inland Steel Company (Employer), by —  
—, (Representative) (Title).

Dated — — —.

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

11. Said Decision and Order was signed by Board Chairman Herzog, and Board Members Houston, Reynolds and Murdock. It was not signed by Board Member Gray who filed a dissenting opinion.

[fol. 395] 12. Section 203.86 of the Board's Rules and Regulations, Series 5, effective August 22, 1947, provides as follows:

*"Time; additional time after service by mail.*—In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run, is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event, the period runs until the end of the next day, which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

13. On May 14, 1948, the Union filed with the Board a document entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board", in which the Union recited that it had complied with Section 9 (f) and (g) of the Act, as amended, within the time limitations prescribed in the Board's Decision and Order of April 12, 1948, and its Rules and Regulations. The Union further recited in its Return that it had not complied

with the requirements of Section 9 (h) of the Act, as amended, for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional and void and that said section violated Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States. The Union therefore requested the Board to make its Decision and Order of April 12, 1948, unconditional in form and effect on the ground that the Union had complied with all of those provisions of Section 9 of the National Labor Relations Act, as amended, which are not illegal or unconstitutional.

14. On May 17, 1948, the Board issued an Order denying the Union's request for an amendment rendering the Board's Order of April 12, 1948 unconditional.

In so far as here relevant, the Order of May 17, 1948 states:

"On May 14, 1948, the Union filed with the Board a document entitled 'Return by United Steelworkers of America to Conditional Order of National Labor Relations Board.' So far as here material, the Union alleges that it has complied with the requirements of Section 9 (f) and (g) of the Act as amended within the time limitation prescribed by the Board's Decision and Order and the Rules and Regulations of the Board, and that it has not complied with the requirements of Section 9 (h) of the Act as amended for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional, and void, in that, in specified respects they violate Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution. Asserting that it has thus complied with all the legal conditions prescribed in the Board's Decision and Order of May 12, 1948, the Union requests that the Board now make its said Order unconditional.

[fol 396] "Upon due consideration of the matter, the Board believes that the Union's request for an amendment rendering the Board's Order unconditional must be, and it hereby is, denied. In the absence of authoritative judicial determination to the contrary, the Board assumes the constitutional validity of the provisions of the amended Act."

15. Petitioners are persons aggrieved by the Board's Orders of April 12, 1948 and May 17, 1948 and present this petition to review said Orders.

### Statement of Points

16. That portion of the Board's Order of April 12, 1948 which requires the Union to comply with Section 9 (h) of the Act, as amended, is illegal, unconstitutional, void and of no effect. Said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States for the following reasons:

(a) Section 9 (h) of the National Labor Relations Act, as amended abridges the rights of the Union's officers to freedom of speech, press and assembly in violation of the First Amendment.

(b) Section 9 (h) of the National Labor Relations Act, as amended, abridges the right of the members of the Union to elect officers of their own choosing and interferes with the right of freely elected officers of the Union to function on behalf of the membership by imposing a political test on such officers, thus impairing the right of free assembly in violation of the First Amendment.

(c) Section 9 (h) of the National Labor Relations Act, as amended, is vague, indefinite and uncertain and prescribes no ascertainable standard of conduct so that any officer of the Union who is required to execute the affidavit under said section is afforded no reasonable means to avoid prosecution under Section 35 A of the Criminal Code.

(d) Section 9 (h) of the National Labor Relations Act, as amended, imposes an unreasonable restriction upon the exercise of the rights of free speech and assembly by the officers and members of the Union, in that it compels the loss of valuable property and other rights as a condition to the exercise of the rights of free speech and assembly, in violation of the First Amendment and the due process clause of the Fifth Amendment.

(e) Section 9 (h) of the National Labor Relations Act, as amended, abridges the right of the officers of the Union to engage in political activities right reserved to the people by the Ninth and Tenth Amendments.

[fol. 397] (f) Section 9 (h) of the National Labor Relations Act, as amended, applies only to labor organizations and not to employers. This constitutes an arbitrary discrimination against labor organizations, their officers and members, in violation of the Fifth Amendment.

(g) Section 9 (h) of the National Labor Relations Act, as amended, constitutes a bill of attainder in violation of Article I, Section 9 (3) of the Constitution of the United States.

(h) Section 9 (h) of the National Labor Relations Act, as amended deprives the members of the Union of valuable property rights and of the opportunity to obtain enforcement of said rights in the courts.

17. The Board's Order of May 17, 1948, denying the Union's request for an amendment rendering the Board's Order of April 12, 1948, unconditional is contrary to law and should be set aside on the ground that Section 9 (h) of the Act, as amended, is unconstitutional for the reasons stated in paragraph 16 hereof.

18. Petitioners respectfully assert that they are aggrieved by that portion of the Board's Order of April 12, 1948, requiring them to comply with the requirements of Section 9 (h) of the Act, as amended, and with that portion of the Board's Order of May 17, 1948, denying their request for an amendment of its Order of April 12, 1948 rendering said Order unconditional.

19. On April 30, 1948, there was filed in this Court by the Inland Steel Company, and docketed as Case No. 9612, a petition to review and set aside the Board's Order of April 12, 1948, set forth in full in paragraph 9 hereof requiring the Inland Steel Company to bargain collectively with the Union with respect to its pension and retirement policies. Petitioners herein have a substantial interest in the subject matter of Case No. 9612.

#### Prayer

Wherefore, petitioners respectfully pray:

1. That said Board be required to certify for filing with this Court a transcript of the entire record in said Case No. 13-C-2836, including the Union's Return to Conditional Order of National Labor Relations Board filed with the



Board on May 14, 1948, and the Board's Order of May 17, 1948.

[fol. 398] 2. That the Board's Order of April 12, 1948, be rendered unconditional on the ground that Section 9 (h) of the National Labor Relations Act, as amended, is illegal, unconstitutional, void and of no effect and that petitioners have such other and further relief as this Court may deem just and proper.

3. That petitioners be permitted to intervene as parties defendants in Case No. 9612 on the ground that they have a substantial interest in the subject matter of the action and that their intervention will not to any extent delay or prejudice the determination of the issues.

4. That this petition be consolidated for all purposes with the petition filed in Case No. 9612 on the ground that both petitions have arisen out of a single Order of the Board.

Respectfully submitted, Philip Murray, President,  
United Steelworkers of America, CIO; United  
Steelworkers of America, CIO, and its Members;  
Local Union No. 1010, USA-CIO; Local Union No.  
64, USA-CIO, by Arthur J. Goldberg, Frank Donner,  
Attorneys for Petitioners.

[fol. 399] And afterwards, to-wit, on the eleventh day of June, 1948, the following proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT, CHICAGO 10, ILLINOIS

June 11, 1948

Before Hon. J. Earl Major, Circuit Judge; Hon. Otto  
Kerner, Circuit Judge; Hon. Sherman Minton, Circuit  
Judge

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., by Its Presi-  
dent Philip Murray, Local Unions Nos. 1010 and 64,  
United Steelworkers of America, C. I. O., Petitioners;

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petitions to Review and Set Aside an Order of the National  
Labor Relations Board

On petition of counsel for the United Steel Workers of  
America, C. I. O., by its President Philip Murray, et al.,  
it is ordered that Case No. 9612, entitled Inland Steel Com-  
pany, Petitioner, vs. National Labor Relations Board, Re-  
spondent, and Case No. 9634, United Steel Workers of  
America, C. I. O., by its President Philip Murray, et al.,  
Petitioners, vs. National Labor Relations Board, Respond-  
ent, be, and the same are hereby, consolidated.

On motions of counsel for the Petitioners in Case Nos.  
9612 and 9634, it is ordered that these cases be advanced  
for hearing and that the Petitioners' briefs be filed by June  
23, 1948, Respondent's brief be filed by July 12, 1948, reply  
briefs for Petitioners be filed by July 16, 1948, and that  
the oral argument be had on July 21, 1948.

[fol. 400] And afterwards, to-wit, on the fourteenth day of June, 1948, there was filed in the office of the Clerk of this Court, the certified transcript of record of proceedings before the National Labor Relations Board, the printed portions of which are contained in the Appendix to Petitioner's Brief in No. 9612, filed on June 26, 1948, the Appendix to Brief for Petitioner's in case No. 9634, filed on June 26, 1948, and the Appendix to Respondent's Brief, filed in cases No. 9612 and 9634 on July 14, 1948.

And afterwards, to-wit, on the twenty-first day of June, 1948, there was filed in the Office of the Clerk of this Court, the Answer of the National Labor Relations Board to the Petitions for Review filed in cases No. 9612 and 9634, which said answer to petitions for review appears on pages 46 to 55 inclusive of the Appendix to Petitioner's Brief in No. 9612 filed on June 26, 1948.

[fol. 401] And afterwards, to-wit, on the twenty-third day of June, 1948, the following further proceedings were had and entered of record, to-wit:

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., by Its President Philip Murray, Local Unions Nos. 1010 and 64, United Steel Workers of America, C. I. O., Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petitions to Review and Set Aside an Order of the National Labor Relations Board

Before Major, C. J.; Kerner, C. J.

On motion of counsel for the United Steel Workers of America, C. I. O., by its President Philip Murray, Local Unions Nos. 1010 and 64, United Steel Workers of America, C. I. O., and Members of the United Steel Workers of

America, C. I. O., it is ordered by the Court that leave be, and the same is hereby, granted to the said Union to intervene in Case No. 9612.

[fol. 402] And afterwards, to-wit, on the twenty-sixth day of June 1948, there was filed in the office of the Clerk of this Court an Appendix to Petitioner's Brief in No. 9612, which said Appendix is certified as a part of this transcript under a separate certificate.

And on the same day, to-wit, on the twenty-sixth day of June, 1948, there was filed in the office of the Clerk of this Court an Appendix to Brief for Petitioners in Case No. 9634, which said Appendix is certified as a part of this transcript under a separate certificate.

And afterwards, to-wit, on the fourteenth day of July, 1948, there was filed in the office of the Clerk of this Court an Appendix to Respondent's Brief in Cases No. 9612 and 9634, which Appendix is certified as a part of this transcript under a separate certificate.

[fol. 403] And afterward, to-wit, on the twenty-first day of July, 1948, the following further proceedings were had and entered of record, to-wit:

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petition for Review of An Order of the National Labor Relations Board

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Ernest S. Ballard, counsel for the Petitioner, and by Mr. Marcel Mallet-Prevost, counsel for the Respondent, and the Court takes this matter under advisement.

UNITED STEEL WORKERS OF AMERICA, C.I.O., by its President,  
Philip Murray, Local Unions Nos. 1010 and 64, United  
Steel Workers of America, C.I.O., and Members of the  
United Steel Workers of America, C.I.O., Petitioners

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petition for Review of An Order of the National Labor  
Relations Board

Now this day come the parties by their counsel, and this  
cause comes on to be heard on the transcript of the record  
and the briefs of counsel, and on oral argument by Mr.  
Arthur J. Goldberg and Mr. Frank Donner, counsel for the  
Petitioners, and by Mr. Mozart G. Ratner, counsel for the  
Respondent, and the Court takes this matter under advise-  
ment.



[fol. 404] And afterwards, to-wit, on the twenty-second day of July, 1948, there was filed in the office of the Clerk of this Court the Answer of the National Labor Relations Board to Petitioner's Motion in Case No. 9612 to strike certain matter from the Appendix to the Board's Brief, which Answer is in the words and figures following, to-wit:

[fol. 405] [Stamp:] U. S. C. C. A.-7. Filed Jul. 22, 1948.  
Kenneth J. Carrick, Clerk

Major, C. J. Kerner, C. J. Minton, C. J.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT

No. 9612

INLAND STEEL COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, CIO, et al.,  
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition to Review and Set Aside An Order of the  
National Labor Relations Board

Answer to Petitioner's Motion (In No. 9612) To Strike  
Certain Matter from the Appendix to the Board's Brief

Comes now the National Labor Relations Board, respondent herein, and by its Chief Enforcement Attorney, opposes the motion of petitioner in No. 9612 to strike from the appendix to the Board's brief certain portions of Board Exhibit 3 printed therein. In support of its opposition to said motion the Board respectfully shows as follows:

The entire text of Board Exhibit 3, as printed in the appendix to the Board's brief is part of the official transcript of record filed with the Court in this proceeding. It

was received in evidence by the trial examiner, with the express understanding, as petitioner states in its motion (p. 2), that "the exhibit is offered solely as evidence of [fol. 406] the extracts from publications and documents quoted therein" and that the "various statements and arguments there . . . Shall be considered as part of the arguments of Board's counsel in connection with the issue involved in this case" (Co. App. 207-208).

The entire text of Board Exhibit 3, being part of the record herein, we submit that the Board could properly include it in the appendix to the Board's brief, and that petitioner's motion should be denied.

Respectfully submitted, Owsley Vose, Chief Enforcement Attorney.

Dated: July 19, 1948.

[fol. 407] And afterward, to-wit, on the twenty-third day of September, 1948, the following further proceedings were had and entered of record, to-wit:

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT, OCTOBER TERM, 1947, APRIL SESSION, 1948

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., et al.,  
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petitions to Review and Set Aside an Order of the  
National Labor Relations Board

September 23, 1948

Before Major, Kerner, and Minton, Circuit Judges

MAJOR, Circuit Judge:

These cases are here upon petition (in No. 9612) of Inland Steel Company (hereinafter called the Company), to review

leges, had a right to attach as a condition to their enjoyment the requirement contained in Sec. 9 (h). The Board in its brief states and restates that the purpose of Congress was to eliminate from the bargaining process Communist-dominated Unions. Its position is stated thus:

"We turn then to the precise questions which may here properly be presented, whether denial of the benefits of the Act to labor organizations whose officers are Communists or members of Communist dominated organizations, or who believe in, or support organizations which advocate violent overthrow of the government, is reasonably related to the objectives which Congress legitimately sought to promote by enactment of the statute, and whether the methods utilized to promote these objectives are appropriate means for their effectuation."

Referring to the opinion in the *Herzog* case, the Board states:

"The Court concluded that the consequences upon self-organizational activity of wilful non-compliance by a union with conditions which Congress was entitled to impose could not be attributed to Congress or to the Board, but solely to the union itself, and that denial [fol. 424] of the benefits of the Act to labor organizations which refused to comply could therefore not be said to deprive those labor organizations of their constitutional right to freedom of association."

Thus, the fallacious premise is laid for the Board's argument that Congress, having endowed labor organizations with certain benefits, was justified in imposing a condition that such benefits should not be enjoyed by Communist-dominated organizations. A hypothetical situation is created which bears no resemblance either to the requirements of the section or to the benefits bestowed by the Act. Sec. 9 (h) imposes no obligation upon a Union, Communist-dominated or otherwise; in fact, a Union is without power to comply with the condition which Congress has imposed. This is in marked contrast with Sec. 9 (f) and (g), which require the Unions to file certain factual reports as a prerequisite to their right to act as a bargaining agent. The instant section is directed at the individual officers of this

and set aside an order issued by the National Labor Relations Board on April 12, 1948, against the Company, pursuant to Sec. 10(c) of the National Labor Relations Act,<sup>1</sup> following the usual proceedings under Sec. 10 of the Act, and upon petition (in No. 9634) of the United Steel Workers of America, C. I. O. (hereinafter called the Union), to review and set aside a condition attached to the Board's order.

In the beginning, it seems appropriate to set forth that portion of the Board's order which gives rise to the questions here in controversy. The order requires the Company to

"Cease and desist from:

"(a) Refusing to bargain collectively with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO), with respect to its pension and retirement policies if and when said labor organization shall have complied within thirty (30) days from the date of this Order, with Section 9(f), (g), and (h) of the Act, as amended, as the exclusive bargaining representative of all production, maintenance, and transportation workers in the [petitioner's] Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding foremen, assistant foremen, supervisory, office and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen, and nurses;

"(b) Making any unilateral changes, affecting any employees in the unit represented by the Union, with respect to its pension and retirement policies without prior consultation with the Union, when and if the Union shall have complied with the filing requirements of the Act, as amended, in the manner set forth above."

<sup>1</sup> The National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. Secs. 151, et seq.) (hereinafter referred to as the Act) was amended by the Labor Management Relations Act, 1947, effective August 22, 1947 (61 Stat. 136, 29 U. S. C. A. Supp. July, 1947, Secs. 141, et seq.) (hereinafter referred to as the amended Act). The unfair labor practices found by the Board herein occurred, in part, prior to the effective date of the amendment and, in part, thereafter.

far-flung labor organization, each of whom has been empowered to stymie the entire bargaining process and thus deprive the Union of its right to act as bargaining agent. And a single official can do this very thing by refusing to make the affidavit for any reason or no reason. He may refuse solely because of an arbitrary or capricious attitude, because the terms of the statute are so vague as to make it uncertain whether the affidavit can be truthfully made, or because he belongs to the proscribed class. Thus, the section gathers within its devastating reach a Union all of whose officials save one are willing and able to make the affidavit.

The impact which this section has upon employees represented by the Union is even more pronounced. As illustrative, the Union in the instant situation has been duly selected by some 12,000 employees of an appropriate bargaining unit as their agent. The Board minimizes, in fact almost ignores, their predicament. Their interest is disposed of on the erroneous theory that their rights stem from Congress, and what Congress has given it can take away.

It is well to keep in mind, however, what the Board appears to overlook, that is, that employees have certain constitutional rights irrespective of any benefit bestowed by the Wagner Act or its successor. It has been held that the right "to organize for the purpose of securing redress of [fol. 425] grievances and to permit agreement with the employers relating to rates of pay and conditions of work" is a constitutional right, and that the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other material protection is fundamental. Further, that employees have as clear a right to organize and select their representatives for a lawful purpose as an employer has to organize its business and select its own officers and agents. *Labor Board v. Jones & Laughlin*, 301 U. S. 1, 33. And it has been held that the right of workmen or of Unions "to assemble and discuss their own affairs is as fully protected by the Constitution as the right of business men, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others." *Thomas v. Collins*, 323 U. S. 516, 539. And as employees have a constitutional right to organize, to select a bargaining agent of their own choosing and, if members of a Union, to elect the



The Company, in case No. 9612, attacks that portion of the order which requires it to bargain with respect to its retirement and pension policies. The Union has been permitted to intervene and joins the Board in the defense of this part of the order. The Union, in case No. 9634, at [fol. 409] tacks the condition attached to the order, which requires as a prerequisite to its enforcement that the Union comply with Sec. 9(h) of the Act. Obviously, if the Company's position is sustained, the Union's petition need not be considered. On the other hand, if the Company's contention is denied, we will be confronted with the question raised by the Union.

We shall, therefore, first consider the question presented on the Company's petition for review. In doing so, we do not overlook the Board's contention that we are without authority to consider such question on the ground that the Company is not aggrieved until there has been compliance by the Union with the condition attached to the order. We think this contention is without merit and need not be discussed.

There is no question as to jurisdiction and no dispute of any consequence as to the facts in either case. The Company's refusal to bargain concerning a retirement and pension plan is based solely on its contention that it is not required to do so under the terms of the Act. The Union has refused to comply with the condition attached to the order insofar as Sec. 9 (h) is concerned, on the ground that the paragraph is unconstitutional. Thus, a question of law is presented in each case.

The collective bargaining requirement in the original Act was embraced mainly in Secs. 8(5) and 9(a)<sup>2</sup>. No question is raised as to any change in the status of the parties because of the amended Act. It seems, therefore, that the original Act is of importance only as an aid in construing the amended Act wherein Congress employed the identical language, so far as pertinent to the instant question, which it had originally used.

<sup>2</sup> These sections were reenacted in Secs. 8(a)(5) and 9(a) of the amended Act, without material change so far as the present issue is concerned. The Board found that retirement and pension matters were subjects of compulsory collective bargaining under the Act and that they remained so under the amended Act.

officials of such Union, so I would think that the bargaining agent when so selected had a right of equal standing to represent for all legitimate purposes those by whom it had been selected. The employees in the instant situation have availed themselves of constitutional rights in selecting the Union as their bargaining agent and in the election of its officials.

At this point it is pertinent to observe that the Wagner Act was enacted primarily for the benefit of employees and not for Unions. The latter derive their authority from the employees when selected as their bargaining agent, rather than from the law. The very heart of the Act is contained in Sec. 7, which provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . ." This was not a Congress-created right but the recognition of a constitutional right, which Congress provided the means to protect. This is clearly shown by the declared policy of the Act that commerce be aided "by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

[fol. 426] In my view, the condition attached to the Board's order in the instant case is a direct and serious impairment upon these constitutional rights of both the employees and the Union. The rights of the former to organize, select a bargaining agent of their own choosing and elect officers of the Union have been reduced to a state of meaningless gesture. See *Texas and N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 570, and *Labor Board v. Jones & Laughlin*, *supra*, page 34.

In order to comply with the condition of the Board's order, they must select a bargaining agent not of their own choosing but one which conforms to the pattern which Congress has prescribed. The fundamental right to elect officers of their Union, untrammelled and unfettered, has been made subservient to the congressional edict as to the character of officials which will be tolerated. Not only does the section represent an intrusion by Congress in the internal affairs of a Union and its members, but it is legislative

The Company relates in lengthy detail the complicated nature of its retirement and pension plan, for the purpose, as we understand, of showing that it is impossible, or at any rate highly impractical, for it to bargain relative thereto with the multiplicity of bargaining units which the Board has established in its plant. It states in its brief:

[fol. 410] "Retirement and pension plans such as the petitioner's cannot be dealt with through the processes of compulsory collective bargaining required by the National Labor Relations Act, which entail bargaining within units of the character established by Section 9(a) and (b) of that Act."

The Company concedes that "Congress could have established a requirement of compulsory collective bargaining upon any subject which a representative of the employees chose to present for that purpose," and we understand from some parts of its argument that it tacitly concedes that some retirement and pension plans may be within the scope of the bargaining requirement. However, we find in the Company's reply brief, in response to the Board's argument, what appears to be the inconsistent statement that "Congress intended to exclude from the compulsory bargaining requirement of the Act all industrial retirement and pension plans. The law is a law for all and it is the same law." We agree, of course, with the last sentence of this quotation. We also are of the view that the bargaining requirements of the Act include all retirement and pension plans or none. Otherwise, as the Board points out, "some employers would have to bargain about pensions and some would not, depending entirely upon the unit structure in the plant and the nature of the pension plan the employer has established or desires to establish." Such a holding as to the Act's requirements would supply the incentive for an employer to devise a plan or system which would be sufficiently comprehensive and difficult to remove it from the ambit of the statute, and success of such an effort would depend upon the ingenuity of the formulator of the plan. We are satisfied no such construction of the Act can reasonably be made.

It is, therefore, our view that the Company's retirement and pension plan, complicated as it is asserted to be,

must be treated and considered the same as any other such plan. It follows that the issue for decision is, as the Board asserts, whether pension and retirement plans are part of the subject matter of compulsory collective bargaining within the meaning of the Act. The contention which we have just discussed has been treated first, and perhaps somewhat out of order, so as to obviate the necessity for a lengthy and detailed statement of the Company's plan.

Briefly, the plan as originally initiated on January 1, [fol. 411] 1936, provided for the establishment of a contributory plan for the payment of retirement annuities pursuant to a contract between the Company and the Equitable Life Assurance Society. Only employees with earnings of \$250.00 or more per month were eligible to participate. Effective December 31, 1943, the plan was extended to cover all employees regardless of the amount of their earnings, provided they had attained the age of 30 and had five years of service. The plan from the beginning was optional with the employees, who could drop out at any time, with rights upon retirement fixed as of that date. On December 28, 1945, the Company entered into an agreement with the First National Bank of Chicago, wherein the Company established a pension trust, the purpose of which was to augment the Company's pension program by making annuities available to employees whose period of service had occurred largely during years prior to the time when participation in the retirement plan was available to them. These were employees whose retirement date would occur so soon after the establishment of the plan that it would not afford them adequate retirement annuity benefits. The employees eligible to participate in the pension trust were not required to contribute thereto, but such fund was created by the Company's contributions.

An integral and it is asserted an essential part of the plan from the beginning was that employees be compulsorily retired at the age of 65. (There are some exceptions to this requirement which are not material here.)

The Company's plan had been in effect for five and one-half years when, because of the increased demands for production and with a shortage of manpower occasioned by the war, it was compelled to suspend the retirement of its employees as provided by its established program. In consequence there were no retirements for age at either

of the plants involved in the instant proceeding from August 26, 1941 to April 1, 1946. This temporary suspension of the compulsory retirement rule was abrogated, and it was determined by the Company that no retirements should be deferred beyond June 30, 1946. By April 1, 1946, all of the Company's employees, some 224 in number, who had reached the age of 65, had been retired. Thereupon, the Union filed with the Company a grievance protesting its action in the automatic retirement of employees at the age of 65. The Company refused to discuss this grievance [fol. 412] with the Union, taking the position that it was not required under the Act to do so or to bargain concerning its retirement and pension plan, and particularly concerning the compulsory retirement feature thereof. Whereupon, the instant proceedings was instituted before the Board, with the result already noted.

This brings us to the particular language in controversy. Sec. 8(5) of the Act requires an employer "to bargain collectively with the representative of his employees, subject to the provisions of Sec. 9(a)," and the latter section provides that the duly selected representative of the employees in an appropriate unit shall be their exclusive representative "for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." (Italics supplied.) The instant controversy has to do with the construction to be given or the meaning to be attached to the italicized words; in fact, the controversy is narrowed to the meaning to be attached to the term "wages" or "other conditions of employment."

The Board found and concluded that the benefits accruing to an employee by reason of a retirement or pension plan are encompassed in both categories. As to the former, it stated in its decision:

"With due regard for the aims and purposes of the Act and the evils which it sought to correct, we are convinced and find that the term 'wages' as used in Section 9(a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. . . . Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure,



and the character of the employee representative's interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is effected."

The Board also found and concluded that in any event a retirement and pension plan is included in "conditions of employment" and is a matter for collective bargaining. After a careful study of the well written briefs with which we have been favored, we find ourselves in agreement with the Board's conclusion. In fact, we are convinced that the language employed by Congress, considered in connection with the purpose of the Act, so clearly includes a retirement [fol. 413] and pension plan as to leave little, if any, room for construction. While, as the Company has demonstrated, a reasonable argument can be made that the benefits flowing from such a plan are not "wages," we think the better and more logical argument is on the other side, and certainly there is, in our opinion, no sound basis for an argument that such a plan is not clearly included in the phrase, "other conditions of employment." The language employed, when viewed in connection with the stated purpose of the Act, leads irresistibly to such a conclusion. And we find nothing in the numerous authorities called to our attention or in the legislative history so strongly relied upon which demonstrates a contrary intent and purpose on the part of Congress.

The opening sentence in the Company's argument is as follows: "Sections 8(5) and 9(a) of the Act do not refer to industrial retirement and pension plans, such as that of the petitioner, in haec verba." Of course not, and this is equally true as to the myriad matters arising from the employer-employee relationship which are recognized as included in the bargaining requirements of the Act but which are not specifically referred to. Illustrative are the numerous matters concerning which the Company and the Union have bargained and agreed, as embodied in their contract of April 30, 1945. A few of such matters are: a provision agreeing to bargain concerning nondiscriminatory discharges; a provision concerning seniority rights, with its far reaching effect upon promotions and demotions; a provision for the benefit of employees inducted into the military service; a provision determining vacation periods with pay; a provision concerning the safety and health of

of the Board, and they must do this even though it be contrary to their belief, conscience and better judgment. Experience, ability, honesty and integrity of candidates for official positions in the Union must be cast aside.

For similar reasons, the section also affects, and I think seriously impairs, the fundamental rights of Union officials. The affidavit prescribed is directed at the belief entertained by the affiant in contrast to conduct, behavior or action. Assuming *arguendo*, however, that it has no effect upon the constitutional right of an officer who refuses to make it, what about the effect upon those who comply? The right of the officers of a union to manage and control its affairs is a basic right and I would suppose to be exercised in accordance with the principle of majority rule. The section, however, limits the rights of the officers of a Union by making them dependent upon the affirmative action of each officer. The officers who make the affidavit, even though in the majority, are no better off than if they had refused. More than that, the affidavit, particularly in view of its vague and uncertain terms, is calculated to create in the mind of the maker a continuous apprehension lest the affiant make some expression, perform some act, have some association [fol. 428] or indulge in conduct which might later be used as evidence to show that the affidavit was false. As was said in the dissenting opinion in *Minersville School District v. Gabis*, 310 U. S. 586, 606:

"The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist."

In my view, Congress has attempted to do indirectly what it could not do directly under the Constitution. "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect." *Oyama v. California*, 332 U. S. 633, 636.

Many cases are cited and relied upon in support of the

employees, including clinic facilities; a provision for infant feeding, and a provision binding the Company and the Union to bargain, in conformity with a Directive Order of the National War Labor Board concerning dismissal or severance pay for employees displaced as the result of the closing of plants or the reduction in the working force following the termination of the war. None of these matters and many others which could be mentioned are referred to in the Act "*in haec verba*," yet we think they are recognized generally, and they have been specifically recognized by the Company the instant case as proper matters for bargaining and, as a result, have been included in a contract [fol. 414] with the Union. Some of the benefits thus conferred could properly be designated as "wages," and they are all "conditions of employment." We think no common sense view would permit a distinction to be made as to the benefits inuring to the employees by reason of a retirement and pension plan.

The Company in its brief states the reasons for the establishment of a uniform fixed compulsory retirement age for all of its employees in connection with its retirement annuity program, among which are (1) "The fixed retirement age gives the employee advance notice as to the length of his possible service with the Company and enables him to plan accordingly," (2) "The fixed retirement age prevents grievances that otherwise would multiply as the question of each employee's employability arose," (3) "A fixed retirement age gives an incentive to younger men," and (4) "It is unfair and destructive of employee morale to discriminate between types of jobs or types of employees in retiring such employees from service." These reasons thus stated for a compulsory retirement age demonstrate, so we think, contrary to the Company's contention, that the plan is included in "conditions of employment."

The Supreme Court, in *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 360, held that collective bargaining extends to matters involving discharge actions and, as already noted, the Company in its contract with the Union has so recognized. We are unable to differentiate between the conceded right of a Union to bargain concerning a discharge, and particularly a nondiscriminatory discharge, of an employee and its right to bargain concerning the age at which he is compelled to retire. In either case, the employee loses his job at the command of the employer; in either case,

argument that Congress was reasonably justified in attaching the condition contained in Par. (h) as a prerequisite to the right of employees to compulsory bargaining. Without attempting to mention all of such cases, a few may be noted as typical. *Turner v. Williams*, 194 U. S. 279; *Hawker v. New York*, 170 U. S. 189; *Hamilton v. Board of Regents*, 293 U. S. 245, *United Public Workers v. Mitchell*, 330 U. S. 75. The strongest of these cases, in my judgment, is the *Mitchell* case. There, the question involved was the constitutionality of the Hatch Act, which forbade government employees to engage in political activity, admittedly a right protected by the First Amendment. There, the favor bestowed by Congress was governmental employment, and an employee had the choice between accepting the favor and foregoing his right to engage in political activity, or in declining the governmental favor and exercising such right. This is quite a contrast to the instant situation where the grant is bestowed upon the employees with the power lodged in a third person to prevent them from obtaining the benefit.

*Turner v. Williams*, *supra*, is of no benefit to the Board's position. There, it was held that Congress could properly make the privilege of immigration turn upon the political beliefs of the immigrant. As later pointed out in *Bridges v. Wixon*, 326 U. S. 135, 161, "Since an alien obviously [fol. 429] brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit." In other words, an alien, at least in the first instance, is not entitled to the benefits of the Bill of Rights. In the *Hawker* case, *supra*, it was held that a State could constitutionally prevent persons who had previously been convicted of a felony from practicing medicine. The decision goes no further than holding that the State under its police power had the authority to fix the standards to be met by one who sought the privilege of administering to the health and well being of its citizens. In *Hamilton v. Board of Regents*, it was held that the State might properly bar from its colleges persons who refused to attend classes in military training. Again, the condition attached to the privilege could be met at the discretion of the person who sought to become the recipient of the State's favor.

Another relevant pronouncement is that contained in *East Trucking Co. v. R. R. Commission*, 271 U. S. 583. There,



the effect upon the "conditions" of the person's employment is that the employment is terminated, and we think, in either case, the affected employee is entitled under the Act to bargain collectively through his duly selected representatives concerning such termination. In one instance, the cessation of employment comes perhaps suddenly and without advance notice or warning, while in the other, his employment ceases as a result of a plan announced in advance by the Company. And it must be remembered that the retirement age in the instant situation is determined by the Company and forced upon the employees without consultation and without any voice as to whether the retirement age [fol. 415] is to be 65 or some other age. The Company's position that the age of retirement is not a matter for bargaining leads to the incongruous result that a proper bargaining matter is presented if an employee is suddenly discharged on the day before he reaches the age of 65, but that the next day, when he is subject to compulsory retirement, his Union is without right to bargain concerning such retirement.

The Company, however, attempts to escape the force of this reasoning by arguing that the retirement provision affects tenure of employment as distinguished from a condition of employment. The argument, as we understand, rests on the premise that the Act makes a distinction between "tenure of employment" and "conditions of employment," and attention is called to the use of those terms in Secs. 8(3) and 2(9) of the Act. Having thus asserted this distinction, the argument proceeds that tenure of employment is not embraced within the term "conditions of employment." Assuming that the Act recognizes such distinction for some purposes, it does not follow that such a distinction may properly be made for the purpose of collective bargaining, as defined in Sec. 9(a). "Tenure" as presently used undoubtedly means duration or length of employment. The tenure of employment is terminated just as effectively by a discharge for cause as by a dismissal occasioned by a retirement provision. And in both instances alike, the time of the termination of such tenure is determined by the Company. As already shown, a termination by discharge is concededly a matter for collective bargaining. To say that termination by retirement is not amenable to the same process could not, in our judgment, be supported by logic,



reason or common sense. In our view, the contention is without merit.

The Company also concedes that seniority is a proper matter for collective bargaining and, as already noted, has so recognized by its contract with the Union. It states in its brief that seniority is "the very heart of conditions of employment." Among the purposes which seniority serves is the protection of employees against arbitrary management conduct in connection with hire, promotion, demotion, transfer and discharge, and the creation of job security for older workers. A unilateral retirement and pension plan has as its main objective not job security for older workers but their retirement at an age predetermined by the Company, and we think the latter is as much included in "conditions of employment" as the former. What would be [fol. 416] the purpose of protecting senior employees against lay-off when an employer could arbitrarily and unilaterally place the compulsory retirement age at any level which might suit its purpose? If the Company may fix an age at 65, there is nothing to prevent it from deciding that 50 or 45 is the age at which employees are no longer employable, and in this manner wholly frustrate the seniority protections for which the Union has bargained. Again we note that discharges and seniority rights, like a retirement and pension plan, are not specifically mentioned in the bargaining requirements of the Act.

The Company in its brief as to seniority rights states that it "affects the employee's status every day." In contrast, the plain implication to be drawn from its argument is that an employee is a stranger to a retirement and pension plan during all the days of his employment and that it affects him in no manner until he arrives at the retirement age. We think such reasoning is without logic. Suppose that a person seeking employment was offered a job by each of two companies equal in all respects except that one had a retirement and pension plan and that the other did not. We think it reasonable to assume an acceptance of the job with the company which had such plan. Of course, that might be described merely as the inducement which caused the job to be accepted, but on acceptance it would become, so we think, one of the "conditions of employment." Every day that such an employee worked his financial status would be enhanced to the extent that his pension benefits increased, and his labor would be performed under a pledge from the

company that certain specified monetary benefits would be his upon reaching the designated age. It surely cannot be seriously disputed but that such a pledge on the part of the company forms a part of the consideration for work performed, and we see no reason why an employee entitled to the benefit of the plan could not upon the refusal of the company to pay, sue and recover such benefits. In this view, the pension thus promised would appear to be as much a part of his "wages" as the money paid him at the time of the rendition of his services. But again we say that in any event such a plan is one of the "conditions of employment."

The Company makes the far fetched argument that the contributions made to a pension plan "differ in no respect [fol. 417] from a voluntary payment that might be made to each employee on his marriage, or on the birth of a child, or on attaining the age of 50, or on enlisting in the armed forces in time of war or on participating as a member of a successful company baseball team," but we think there is a vast difference which arises from the fact that such hypothetical payments are not made as the result of a promise contained in a plan or program. They represent nothing more than a gift. Assume, however, that such supposed payments were made to employees as a result of a company obligation contained in a plan or program. Such an obligation would represent a part of the consideration for services performed, and payments made in the discharge of such obligation would, in our view, be "wages" or included in "conditions of employment."

The Board cites a number of authorities wherein the term "wages" in other fields of law has been broadly construed in support of its conclusion in the instant case that the term includes retirement and pension benefits for the purpose of collective bargaining. While we do not attach too much importance to the broad interpretation given the term in unrelated fields, we think they do show that a broad interpretation here is not unreasonable. For instance, the Board has been sustained in a number of cases where it has treated for the purpose of remedying the effects of discriminatory discharges, in violation of Sec. 8 (3) of the Act, pension and other "beneficial insurance rights of employees as part of the employees' real wages and, in accordance with its authority under Sec. 10 (c), to order reinstatement of

particular person or group because of the personal belief of their associates. As was said in *Schneiderman v. United States*, 320 U. S. 118, 136:

"\* \* \* under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

That the section is void because of its vague and uncertain language appears plain. This is so both as to the persons within its scope and the subject matter of the required affidavit. "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, *Lanzetta v. New Jersey*, 306 U. S. 451, or in regard to the applicable tests to ascertain guilt." *Winters v. New York*, 333 U. S. 507, 515.

The section applies to "each officer of such labor organization and the officers of any national or international labor organization." Such officers are neither enumerated nor defined, either in the section in controversy or otherwise in the Act. While the record does not purport to disclose a list of such officers, it does show that the agreement between the Union and the company was signed by six officials of the national organization, including Philip J. Murray, as president, and by nine officers of the local Union. From the agreement it is discernible that there are twenty members of the grievance committee with authority to negotiate on the part of the Union, twenty assistant [fol. 432] members of the grievance committee, and a safety committee of equal number authorized to represent the Union in its dealings with the company concerning safety matters. I assume that there are hundreds of officers between the bottom and the top of this vast labor organization. The importance of the word "officer" is evident, particularly in view of the fact that "each officer" is given the power by refusal to make the affidavit to paralyze a Union and its members.

That those who come within the scope of the word "officer" have been left in a state of uncertainty and doubt is well illustrated by an opinion of the Labor Board, In

employees with . . . back pay," and has required the employer to restore such benefits to employees discriminated against. See *Buller Bros., et al. v. N. L. R. B.*, 134 F. 2d 981, 985, *General Motors Corp. v. N. L. R. B.*, 150 F. 2d 201, and *N. L. R. B. v. Stackpole Carbon Co.*, 128 F. 2d 188. In the latter case, the court stated (page 191) that the Board's conclusion "seems to us to be in line with the purposes of the Act for the insurance rights in substance were part of the employee's wages."

In the Social Security Act (49 Stat. 642, Sec. 907, 42 U. S. C. A. Sec. 1107), the same Congress which enacted the National Labor Relations Act defined taxable "wages" as embracing "all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other [fol. 418] than cash . . ." This definition has been construed, as the Supreme Court noted, in *Social Security Board v. Nierotko*, 327 U. S. 358, 365 (note 17), as including "vacation allowances," "sick pay," and "dismissal pay."

In the field of taxation, pension and retirement allowances have been deemed to be income of the recipients within the Internal Revenue Act definition of wages as "compensation for personal services." (26 U. S. C. A. Int. Rev. Code Sec. 22 (a)). Thus, in *Hooker v. Hoey*, 27 F. Supp. 489, 490, affirmed 107 F. 2d 1016, the court said: "It cannot be doubted that pensions or retiring allowances paid because of past services are one form of compensation for personal service and constitute taxable income . . ."

The Company in its effort to obtain a construction of Sec. 9 (a) favorable to its contention devotes much of its brief to the legislative history of the Act which it is claimed demonstrates that Congress did not intend to subject retirement and pension plans to the bargaining process. In view of what we have said, this argument may be disposed of without extended discussion. It is sufficient to note that we have studied this legislative history and, while there are some portions of it which appear to support the company's position, yet taken as a whole it is not convincing. It would, in our judgment, require a far stronger showing of congressional intent than exists here before we would be justified in placing a construction upon the provision in question which would do violence to the plain words of the statutory



The Matter of *Northern Virginia Broadcasters, Inc., et al.*, and *Local Union No. 1215, of the National Brotherhood of Electrical Workers*, page 11, volume 75, Decisions and Orders of the N. L. R. B. In that case, the Regional Director, following instructions of the General Counsel of the Labor Board, dismissed the proceeding for failure of compliance with Sec. 9 (h) by the American Federation of Labor, with which the local Union was affiliated. The Board held that compliance by officials of the national organization was not required, on the ground that such a construction would make the section unworkable. There was a concurring and a dissenting opinion. The point is that the Board itself had great difficulty in deciding who were included in the term "officer," and the decision when made was by a divided Board. This emphasizes the difficult problem presented to officers of a Union in attempting to determine whether they are within the scope of persons required to make the affidavit.

The facts required to be stated in the affidavit are of such an uncertain and indefinite nature as to afford little more than a fertile field for speculation and guess. What is meant by a "member of the Communist party or affiliated with such party? How and when does a person become a member of that party, or any other party for that matter? And what does it mean to be "affiliated"? The Supreme Court, in *Bridges v. Wixon, supra*, devoted several pages to the meaning to be attributed to the word "affiliation," as used in the deportation statute. The court's discussion is convincing that its meaning would be quite beyond the reach of the ordinary citizen. As close as the court came to defining the term was (page 143), "It imports, however, less than membership but more than sympathy." The [fol. 433] court pointed out that cooperation with Communist groups was not sufficient to show affiliation with the party.

What does the word "supports" include? Does a person by voting for the candidates of a party or by attending its meetings and making contributions, or by buying its literature or books, become a supporter thereof? And how can the ordinary person possibly be expected to make an affidavit that he is not a member of any organization that believes in or teaches the overthrow of the United States Government "by any illegal or unconstitutional methods"? These are matters which perplex the Bench and the Bar,



requirement and which would result in an impairment of the purpose of the Act. It may be true, as argued by the Company, that retirement and pension plans were employed only to a limited extent in 1935, when the original Act was passed. Such provisions, however, were being generally used at the time of the passage of the Amended Act in 1947. And we doubt the validity of the argument that the language of the latter Act cannot be given a broader scope even though Congress used the same phraseology. We do not believe that it was contemplated that the language of Sec. 9 (a) was to remain static. Congress in the original as well as in the amended Act used general language, evidently designed to meet the increasing problems arising from the employer-employee relationship. As was said in *Weems v. United States*, 217 U. S. 349, 373:

[fol. 419] "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."

The Company places great stress upon the bargaining language used in the Railway Labor Act of 1926, on the theory that the instant Act is *in part materia*. It points out that numerous retirement and pension plans were put into effect by the railroads and that they were never subjected to the process of collective bargaining. This showing is made for the purpose of demonstrating that Congress in the enactment of the legislation now before us did not intend to include such matters. In this connection, we think it is pertinent to note that in the Railway Labor Act the bargaining language was quite different from that of the instant legislation. There, it read, "rates of pay, rules, or working conditions." Here, it reads, "rates of pay, wages, hours of employment, or other conditions of employment." A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act. Certainly the term "wages" was intended to include something more than

"rates of pay." Otherwise, its use would have served no purpose. Congress in the instant legislation used the phrase, "other conditions of employment," instead of the phrase, "working conditions," which it had previously used in the Railway Act. We think it is obvious that the phrase which it later used is more inclusive than that which it had formerly used. Even though the disputed language of the instant Act was open to construction, we think a comparison of the language of these two Acts is of no benefit to the Company.

The Company places much reliance upon a statement from the opinion in *J. I. Case Co. v. N. L. R. B.*, 321 U. S. 332, 339. While the court was not considering a question such as that with which we are now concerned, we think it must be conceded that the language furnishes some support for the Company's position, and if this case stood alone as the sole expression of the Supreme Court relative to the [fol. 420] question before us it would at least cause us to hesitate; however, in a later case, *United States v. United Mine Workers of America*, 330 U. S. 258, 286, 287, the court made a statement which indicates a view contrary to the Company's present position. Again, however, the question here presented was not before the court and we do not regard either of these cases as an expression of the view of the Supreme Court upon the instant question. The support which the Company professes to find in the *Case* case is at least offset by the court's statement in the *United Mine Workers* case.

It is our view, therefore, and we so hold that the order of the Board, insofar as it requires the Company to bargain with respect to retirement and pension matters, is valid, and the petition to review, filed by the Company in No. 9612, is denied.

This brings us to the Union's petition for review of the order in No. 9634. Upon issuance of the same, the Union satisfied the condition attached thereto insofar as it pertained to Sec. 9 (f) and (g) of the Act, but failed and refused to comply with Sec. 9 (h).

On May 14, 1948, the Union led with the Board a document entitled "Return by United Steel Workers of America to Conditional Order of National Labor Relations Board," in which the Union requested the Board to amend its order by making it unconditional. In this document, the Union

alleged "that it had not complied with the requirement of Sec. 9 (h) of the Act, as amended, because the Union believes that Sec. 9 (h) is unconstitutional and void." The Board by its order entered May 17, 1948, denied the request, stating:

"Upon due consideration of the matter, the Board believes that the Union's request for an amendment rendering the Board's order unconditional must be, and it hereby is, denied. In the absence of authoritative judicial determination to the contrary, the Board assumes the constitutional validity of the provisions of the amended Act."

Thus, we have presented the important and perplexing problem as to the constitutionality of Sec. 9 (h), the relevant portion of which provides:

"No investigation shall be made by the Board . . . , no petition . . . shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization . . . unless there is on file with [fol. 421] the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

The Union attacks the constitutionality of Par. 9 (h) on the ground that it is violative of the Constitution in numerous respects. It asserts (1) that the provision invades the political freedom of Philip Murray (petitioner), as well as that of other officials of the Union of which he is the head, and of the members of such Union, in violation of the First, Ninth and Tenth Amendments; (2) that it constitutes a bill of attainder within the meaning of Article I, Sec. 9, Clause 3; (3) that it deprives the Union, its officials

and members of liberty and property without due process of law and arbitrarily discriminates against them in violation of the Fifth Amendment, and (4) that it is unconstitutional because of its vagueness, indefiniteness and uncertainty. The constitutionality of the provision has also been attacked by the National Lawyers Guild in a brief which we have permitted to be filed as *amicus curiae*.

The Board defends the constitutional power of Congress to require as a condition to the compulsory right of a labor organization to bargain collectively that each of its officers make the required affidavit. It is argued (1) that the withholding of such benefits does not impinge on the constitutional right to self-organization; (2) that the condition imposed and the congressional policy which it effectuates does not invade rights of freedom of speech or freedom of the press, or deny freedom of political belief, activity or affiliation; (3) that Congress could reasonably believe that the policies of the Act, and the security interests of the nation, would not be fostered by the extension of the benefits of the Act to labor organizations whose officers are Communists or supporters of organizations dominated by Communists; [fol. 422] (4) that the means adopted by Congress to accomplish such purpose are appropriate; (5) that the language of the provision is sufficiently definite and certain to escape constitutional impairment, and (6) that it does not constitute a bill of attainder.

The constitutionality of Sec. 9 (h) has been sustained in *National Maritime Union v. Herzog*, 78 F. Supp. 146, and by the District Court for the Southern District of New York, in *Wholesale and Warehouse Workers' Union, etc. v. Douds*, etc., in a decision rendered June 29, 1948. Each of these cases was decided by a three-Judge statutory court in proceedings wherein it was sought to enjoin the Labor Board from giving effect to the provision in controversy. In the *Herzog* case the court rendered a lengthy opinion in support of its position, which was approved in the *Douds* case. In each of the cases there was a dissenting opinion in which the dissenting Judge viewed the provision as unconstitutional. In the *Herzog* case the court also sustained the constitutionality of Sec. 9 (f) and (g). On appeal, the Supreme Court in a Per Curiam order entered June 21, 1948, 334 U. S. 854, affirmed the statutory court as to these

two paragraphs but found it unnecessary to consider the validity of Sec. 9 (h).

I find myself in disagreement with my associates. Judge Kerner has written an opinion, concurred in by Judge Minton, upholding the constitutionality of the section. I think to the contrary. Among many Supreme Court cases cited and discussed by the respective parties, there are none which present an analogous situation; in fact, the section is unique in the annals of the entire legislative and judicial field. The cases do teach, however, in unmistakable fashion, especially in recent times, the broad interpretation given the First Amendment and the zealous protection which the Supreme Court has afforded it from impairment or encroachment.

As illustrative, a few cases may be noted. "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice." *Thomas v. Collins*, 323 U. S. 516, 530. "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty [fol. 423] loving society will allow." *Bridges v. California*, 314 U. S. 252, 263. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Board of Education v. Barnette*, 319 U. S. 624, 642. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U. S. 88, 101.

The Board in substance concedes that the section cannot be justified by what the Supreme Court has characterized the "clear and present danger rule." *Bridges v. California*, *supra*, page 263; *Thornhill v. Alabama*, *supra*, page 104. Rather, the Board attempts to uphold its validity on the reasoning of the *Herzog* case that Congress, having bestowed upon labor organizations certain benefits and privi-



coercion expressly designed to compel Union members to forego their fundamental rights. "Freedom of speech, freedom of the press, and freedom of religion all have a double aspect—freedom of thought and freedom of action. Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind." Murphy, J., dissenting in *Jones v. City of Opelika*, 316 U. S. 584, 618, subsequently a majority opinion of the court in 319 U. S. 103.

Contrast this philosophy with that which the Board attributes to the Act, as evidenced by the following statement: "The assumption is that if the facts are known through this filing procedure, union members . . . will soon remove Communists from leadership rather than allow themselves to be precluded from enjoying the benefits of the Act. *Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. No. 2."

But it is argued that employees have in their own hands the means of obtaining compliance by the selection of a bargaining representative whose officers are able and willing to make the affidavit. Assuming that employees are always members of a Union which acts as their bargaining agent, which is not the case, it is a shallow and unrealistic argument. How can employees when they select a Union as their bargaining agent know that each of its officers will be able [fol. 427], and willing to make the affidavit? And how can they compel such officers to do so subsequent to their election? How could the members rid their Union of an officer who refused to make the affidavit, for good reason or no reason? The record before us does not disclose who or how many officers refused to make the affidavit. Assuming, however, that it was Philip Murray, president of a national labor organization of which the instant union is an affiliate, how long, I wonder, would it take the 12,000 employees of the bargaining unit here involved to replace him with an officer who would comply? The Act provides that no election shall be directed in any bargaining unit wherein a valid election has been held within the preceding twelve month period. Sec. 159 (c) (3). I do not think that the constitutional rights of the employees or the Union can be suspended in mid-air for a time of such dubious and uncertain length.

The upshot of the whole situation is that employees when members of a Union are under a continuing compulsion to elect officers who will meet the congressional prescription in order that their Union may remain in the good graces

the court held that Congress was without constitutional power to do indirectly what it was prohibited from doing directly in a matter wherein it had attached a condition to be performed as a prerequisite to the receipt of a benefit. The court on page 593 stated:

"May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden."

The Board reviews at length the congressional history and other data for the purpose of demonstrating that Congress was reasonably justified in attaching the condition as a prerequisite to the enjoyment of the benefits which it had provided. As already pointed out, however, it did not give such beneficiaries the option of compliance or [fol. 430] noncompliance. The result of the congressional inquiry is summarized in the Board's brief as follows:

"Congress was not unaware that Communist officers of labor organizations sometimes effectively represent the economic interests of members in collective bargaining, and in grievance adjustment, and that to this extent their activities do tend to effectuate the policies of the Act. But Congress believed that whatever public value Communist leadership of labor unions might have in this respect was clearly outweighed by the danger that they might, on other occasions, utilize their power and influence for purposes inimical to the policies of the Act and to national security."

Thus, notwithstanding this congressional recognition that some labor organizations with Communist officials were willing and able to cooperate in effectuating the

policies of the Act, it placed such Unions in the same category with those whose officials were unwilling to do so, and denied to each class alike the benefits and facilities which Congress had provided. By the same token, the rights of loyal and patriotic employees, as well as Union officials, were made to rest upon the affirmative act of "each" officer of the Union. So, if employees of a bargaining unit are willing to submit to the pressure which Par. (h) engenders and are fortunate enough to select a bargaining agent, each of whose officers will make the affidavit, such employees receive the benefits of the Act. Employees, however, who insist on maintaining their fundamental right to select a bargaining agent, or who for any reason have not succeeded in selecting a bargaining agent, "each" officer of which is willing to comply, are deprived of the congressional grant. The same comparison may be made between competing Unions. One Union is permitted to represent its employees and the other is not. In my view, a statute which creates such a situation, especially considered in connection with its vague and indefinite requirements, is so arbitrarily discriminatory as to violate the due process clause of the Fifth Amendment. As was said in *Hurtado v. California*, 110 U. S. 516, 535:-

"It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case . . . ."

[Vol. 131] See also *Nichols v. Coolidge*, 274 U. S. 531, and *United States v. Lovett*, 328 U. S. 303.

According to the Board's argument, the congressional target was Communist-dominated Unions. The legislative fire, however, was not directed merely at those whom it intended to disable. The range included a scope of far greater area. It encompassed what it recognized as good Communists as well as the bad. And of more importance it included countless patriotic employees and Union officials who carried no taint of Communism. All alike were made to suffer the same fate and required to answer for the sins of a few, even one. From a practical aspect, it is not unlike throwing a barrel of apples in the river in order to get rid of one that is rotten. From a legal viewpoint, it has the effect of arbitrarily singling out for legislative action a

embodied in §9(h) which the order effectuates, invade the right to freedom of speech and deny freedom of political belief activity. It insists that § 9 (h) "is an attempt to restrict freedom of belief"; that the section is "primarily if not exclusively a restraint upon opinion and belief," and that it "imposes sanctions for the alleged evil of harboring 'dangerous thoughts.' "

In support of its contention the Union cites among others the cases appearing in the margin.<sup>1</sup> A study of these cases discloses that in them the court was concerned with the effect of legislation, or judicial action, which imposed a prior restraint upon speech, press or assembly, or which restricted the occasion for permissible exercise of speech, press or assembly, or which punished the individuals for having published their views.

It is to be borne in mind that the Act was not passed because Congress disapproved of the views and beliefs of Communists, but because Congress recognized that the practices of persons who entertained the views presently to be discussed, might not use the powers and benefits conferred by the Act for the purposes intended by Congress, so, in my view, the question is whether Congress, by providing that the facilities of the Board shall not be available to a labor organization unless each of its officers shall file an affidavit with the Board that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, does not belong to, or support any organization believing in or teaching the overthrow of the [fol. 436] United States Government by force or by any illegal or unconstitutional methods, violated the Constitution.

It is to be remembered that neither belief, nor speech, nor association is the subject matter of the policy of §9(h) and that neither that section nor the Board's order imposes any limitation upon what any labor leader may think

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<sup>1</sup> Stromberg v. California, 283 U. S. 359; DeJonge v. Oregon, 299 U. S. 353; Herndon v. Lowry, 301 U. S. 242; Schneider v. State, 308 U. S. 147; Cantwell v. Connecticut, 310 U. S. 296; Bridges v. California, 314 U. S. 252; West Virginia State Board of Education v. Barnette, 319 U. S. 624; Murdock v. Pennsylvania, 319 U. S. 105; Thomas v. Collins, 323 U. S. 516; and Saia v. New York, 334 U. S. 558.



or say, nor does the order or §9(h) attempt to prohibit or restrain anyone from joining or supporting any organization. Neither the order nor §9(h) denies to Communists the right to speak and to publish freely their views, beliefs and opinions. They may speak as they think. There is no invasion of political rights. Communists are not denied the right to continue to remain members of the Communist Party. The section does not make such affiliation of beliefs punishable either criminally or by the imposition of civil sanctions. In such a situation the cases cited by the Union are inapplicable and hence not controlling here, but as was said in *National Maritime Union v. Herzog*, 78 F. Supp. 146, 163, "It is therefore clearly wrong to say that §9(h) impinges on a union officers' freedom of speech."

It is unquestioned that Congress may conclude that the policies of the Act, i.e., stimulation of commerce and the security interests of the nation would be deterred by an extension of the benefits of the Act to labor organizations dominated by officers who are Communists or supporters of organizations dominated by Communists, and that it may take steps to effectuate its conclusions. In fact the "congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' \* \* \*. That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' " *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36. Nevertheless, the Union contends that §9(h) contravenes the guarantees of the Ninth and Tenth Amendments. It insists that the instant case involves more than a regulatory measure, and it argues that if the statute is viewed as one "restricting expression of advocacy," it fails to meet the clear and present danger test.

[fol. 437] While it is true that "a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the reg-



and the diversity of opinion among Judges as to what is illegal and unconstitutional often marks the boundary line between majority and dissenting opinions.

See the recent case of *United States v. Congress of Industrial Organization*, 335 U. S. 106, and particularly the concurring opinion by four members of the court, which held unconstitutional Sec. 313 of the Federal Corrupt Practices Act of 1925, as amended by Sec. 304 of the instant Act, because of the vagueness and uncertainty of the phrase, "a contribution or expenditure in connection with any election \* \* \*". The discussion is quite relevant to the instant situation. On page 153 it is stated:

"Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with the long-established constitutional principles surrounding their delimitation. They measure up neither to the requirement of narrow drafting to meet the precise evil sought to be curbed nor to the one that conduct proscribed must be defined with sufficient specificity not to blanket large areas of unforbidden conduct with doubt and uncertainty of coverage. In this respect the amendment's policy adds its own force to that of due process in the definition of crime to forbid such consequences. \* \* \* Only a master, if any, could walk the perilous wire strung by the section's criterion."

The Board makes no serious argument but that the section is vague and uncertain as charged. It attempts to excuse its infirmities by contending (1) that its vagueness is cured by Sec. 35-A of the Criminal Code, and (2) that the rule against vagueness and uncertainty is not applicable because the statute is not compulsory. No authorities are [fol. 434] cited which sustain either proposition.

The substance of the argument in favor of the first proposition is that an officer of a Union need not be too much concerned about the truthfulness of the affidavit which he makes because he can only be convicted under Sec. 35-A of the Criminal Code for "knowingly and wilfully" making a false affidavit. In the Board's own words, "Clearly, no affiant could successfully be prosecuted under this section for filing a false affidavit under Sec. 9 (h) unless it could be proved that he knowingly lied in making

the averments contained in his affidavit." This statement, so I think, could be made concerning every prosecution for perjury. The Board makes the further puerile suggestion that an affiant need not be afraid of a groundless prosecution because "our law provides adequate modes of redress to victims of malicious prosecution."

To me, this argument is shocking and should be repudiated in no uncertain terms. Bluntly stated, it means that an officer of the Union who makes the affidavit need not be concerned with the sanctity of his oath because of the unlikelihood of conviction in case of a prosecution for perjury. He need not be afraid because the only danger which he assumes is the hazard of a prosecution which when unsuccessful leaves him as the possessor of a damage suit against his accuser in an action for malicious prosecution. This argument is a persuasive indication that the section should be invalidated because of its vagueness and uncertainty.

Neither do I think there is any merit in the suggestion that the authorities as to vagueness and uncertainty are inapplicable because the making of the affidavit is voluntary. In reality, the making of the affidavit is indispensable if the Union is to survive and the rights of its members protected. It is made at the invitation of Congress, and I can discern no reason why the rule as to uncertainty and vagueness should not be applied. The reason for the rule, as the authorities show, is that persons of ordinary intelligence may not be required to guess or speculate at the meaning of a statute, and every reason of which I can think which entitles the maker of a compulsory affidavit to such information exists in the instant situation. The need for this information is emphasized from the fact that the section serves notice that one who makes a false affidavit is subject to prosecution for perjury.

[fol. 435] I would hold Sec. 9(h) unconstitutional and direct the elimination of the condition which the Board has attached to its order.

JUDGE KERNER. I concur in Judge Major's opinion that the Board properly determined that pension and retirement plans constitute part of the subject matter of compulsory collective bargaining under the Act, but I am not persuaded that §9(h) of the Act is invalid.

The Union's principal contention is that the condition imposed by the Board's order and the Congressional policy

ulated activities," cannot be supported under the Constitution, *Kotch v. Board of River Port Pilot Commissioners*, 330 U. S. 552, 556, yet Congress has the power to withhold benefits which it confers for the accomplishment of legitimate purposes within its constitutional powers from those who, it has cause to believe, may utilize those benefits for directly opposite purposes. For example, in *Turner v. Williams*, 194 U. S. 279, it was held that Congress could properly make the privilege of immigration turn upon the political beliefs of the immigrant, and in *United Public Workers v. Mitchell*, 330 U. S. 75, it was held that in the exercise of its power to promote the efficiency of the public service, Congress could properly bar from public employment persons who exercised their constitutional right to engage in political activity. And in *Oklahoma v. Civil Service Commission*, 330 U. S. 127, 143, it was held that Congress in the exercise of its powers to "fix the terms upon which its money allotments to states shall be disbursed," could constitutionally deny allotments to states which refuse to remove from their payrolls employees who engage in political activity. See also *In re Summers*, 325 U. S. 561; *Hamilton v. Board of Regents*, 293 U. S. 245; *Hawker v. New York*, 170 U. S. 189; *Clarke v. Deckebach*, 274 U. S. 392; and *Kotch v. Board of River Port Pilot Commissioners*, *supra*. And where factors relevant to the attainment of legitimate legislative policies are shown, their use as a basis for distinction is not to be condemned. *Hirabayashi v. United States*, 320 U. S. 81, 101. That being so, I think it well to inquire whether there are factors reasonably related to the attainment of the objectives which Congress sought to promote.

Unquestionably, the Labor Management Relations Act, 1947, 61 Stat. 136, was designed to lessen industrial disputes. This purpose is clearly shown in the declaration of policy, §1(b) of the Act, and in the amendment to the findings and policies contained in § 1 of the National Labor Relations Act.

Prior to the passage of the National Labor Relations Act, employers were free to discharge employees for joining labor organizations, and to refuse to bargain collectively with labor organizations which represented their employees. And it is clear that when Congress enacted that [fol. 438] Act it sought to minimize strikes in industries af-

fecting commerce by promoting the process of collective bargaining as a practice conducive to friendly adjustments of disputes over wages, hours and working conditions between employers and employees. In doing this, Congress imposed new obligations upon employers and provided administrative machinery for the enforcement of those obligations, but it did not impose those duties because it was under a constitutional obligation to employees or labor organizations to do so. On the contrary, the statute was enacted solely because Congress deemed the imposition of those duties desirable as a means of protecting the public interest in the free flow of commerce, but the benefits of the Act could not be extended to shield concerted activities which Congress had not intended to protect, *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240; *Southern Steamship Co. v. National Labor Relations Board*, 316 U. S. 31, and any benefit which employees or labor organizations derived from the enforcement of these public rights was entirely incidental to the public purposes which enforcement was designed to achieve. True, under the Act, the Board acts in a public capacity, but not for the adjudication of private rights; rather it exists to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining. The entire scheme of the statute emphasizes this point, and the Supreme Court has so held, *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177; and *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 319 U. S. 9.

Before the enactment of §9(h), hearings were conducted by Congressional committees which showed that Communists did not view labor unions primarily as instrumentalities for the attainment of legitimate economic aims; that certain practices of some labor organizations whose officers were members of or supporters of the Communist Party tended to foment industrial unrest and strife; and that these practices were inimical to the purposes for which the protection of the Act had been granted. From the evidence thus produced and considered Congress believed that Communists and their supporters and persons who advocate the violent overthrow of the Government, when they attain positions of power and leadership in a labor



[fol. 439] organization might not practice collective bargaining as a method of friendly adjustment of employer-employee disputes, but instead might use their position as a vehicle for promoting dissension and strife between employers and employees, and that Communists and their supporters and persons who advocate violent overthrow of the Government, if in control of labor organizations, might provoke strikes disruptive of commerce, not for the purpose of improving the economic lot of union members, but to develop political power to achieve political ends and hence, Congress, in the exercise of its discretion, concluded that extension of the benefits of the Act to such labor organizations would not serve to promote the policies of the Act, but might endanger national interests. The reasonableness of that conclusion was for Congress to determine, *North American Co. v. Securities & Exchange Commission*, 327 U. S. 686, 708, and since there existed a substantial basis in fact for the conclusion reached by Congress, it seems to me that it was rational for Congress to conclude that members of the Communist Party or persons affiliated with such party who believe in and teach the overthrow of the United States Government by force or by any illegal or unconstitutional methods were more likely than others to misuse the powers which inhere in union office. Hence I conclude that Congress acted within its constitutional powers.

The point is made that the section is invalid because the phrases "any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods," "affiliated with," and the word "supports" are vague and indefinite and must fall before the First, Fourth and Fifth Amendments. For the reasons set forth in *National Maritime Union v. Herzog*, *supra*, I think the contention lacks merit. In addition, I believe that the statute is as specific as the nature of the problem permits. Compare *Dunne v. United States*, 138 F. 2d 137, 143. Moreover, the language is not so vague that men of common intelligence would have to guess at its meaning and differ as to its application. It requires only that persons who knowingly engage in the activities set forth in §9(h), or who knowingly believe in the enumerated doctrines, or who knowingly support organizations which disseminate such doctrines, shall not obtain access to the machinery set up by Congress for



the purpose of advancing a specific public policy: hence [fol. 440] if an affiant honestly believes that he is not affiliated with the Communist Party, that he does not support any organization which to his knowledge teaches the overthrow of the United States Government by means which he knows to be illegal or unconstitutional, such an affiant would be in no danger of conviction under Sec. 35(A) of the Criminal Code, 18 U. S. C. A. §80. Compare *United States v. Gulliland*, 312 U. S. 86, 91; *Screws v. United States*, 325 U. S. 91, 101-105. See also *United States v. Petrillo*, 332 U. S. 1.

The point is made that §9(h) is a bill of attainder, because, so it is said, the section proceeds not by way of defining a harmful activity and setting up sanctions against such activity, but by way of a legislative declaration of the guilt of individuals and groups with respect to engaging in such activities.

In my opinion this contention is unsound. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. *Cummings v. The State of Missouri*, 71 U. S. 277, 323. Section 9(h) does not rest upon any finding of guilt, but like the disqualification of convicted felons from medical practice in *Hawker v. New York*, *supra*, and the disqualification of aliens from operating poolrooms in *Clarke v. Deckebach*, *supra*, it operates not to impose punishment but to safeguard important public interests against potential evil. And as was said by Mr. Justice Murphy, "nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality." *North American Co. v. Securities & Exchange Commission*, *supra*, 711.

I conclude the petitions to set aside the Board's order ought to be denied and the request for its enforcement granted.

JUDGE MINTON *concurs* in this opinion.

[fol. 441<sup>9</sup>] And on the same day, to-wit, on the twenty-third day of September, 1948, the following further proceedings were had and entered of record, to-wit:

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition to set aside the order of the National Labor Relations Board entered in this cause on April 12, 1948, be denied and that the Board's request for enforcement of the said order be granted.

No. 9634

UNITED STEEL WORKERS OF AMERICA, C.I.O., et al.,  
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition to set aside the order of the National Labor Relations Board entered in this cause on April 12, 1948, be denied and that the Board's request for enforcement of the said Order be granted.

[fol. 442] And afterward, to-wit, on the twenty-eighth day of October, 1948, the following further proceedings were had and entered of record, to-wit:

[fol. 443] IN THE UNITED STATES CIRCUIT COURT OF AP-  
PEALS FOR THE SEVENTH CIRCUIT

No. 9612

INLAND STEEL COMPANY, Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., et al.,  
Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITIONS FOR REVIEW OF AN ORDER OF THE NATIONAL  
LABOR RELATIONS BOARD

DECREE

The National Labor Relations Board having issued its order against Inland Steel Company on April 12, 1948, Inland Steel Company having petitioned this Court for review of said order, and United Steelworkers of America, C.I.O., et al., having petitioned this Court for review of certain portions of said order, and National Labor Relations Board by its cross prayer having prayed for the enforcement of said order, and this Court having considered said petitions and cross prayer and issued its decision on September 23, 1948, enforcing said order, it is hereby

Ordered, adjudged, and decreed that Inland Steel Company and its officers, agents, successors, and assigns shall

[fol. 444] 1. Cease and desist from:

(a) Refusing to bargain collectively with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO) (hereinafter called "the Union") with respect to its pension and retirement policies, if and when

said labor organization shall have complied within thirty (30) days from the date of this Decree (or, in the event that the Union shall file a petition for a writ of certiorari in the Supreme Court of the United States within the time limited by law, then within thirty (30) days after the denial of such petition, or, if said petition be granted, within (30) days after the issuance of the mandate of the Supreme Court of the United States in the proceedings upon said writ of certiorari) with Section 9 (h) of the Act as amended, as the exclusive bargaining representative of all production, maintenance, and transportation workers in the Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants of Inland Steel Company, excluding foremen, assistant foremen, supervisory office and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen, and nurses;

(b) Making any unilateral changes, affecting any employees in the unit represented by the Union, with respect to its pension and retirement policies without prior consultation with the Union, when and if the Union shall have complied with the filing requirements of the Act, as amended, in the manner set forth above.

[fol. 445] 2. Take the following affirmative action:

(a) Upon request and upon compliance by the Union with the filing requirements of the Act, as amended, in the manner set forth above, bargain collectively with respect to its pension and retirement policies with the Union as the exclusive representative of all its employees in the aforesaid appropriate unit;

(b) Post in conspicuous places throughout its plants at Indiana Harbor, Indiana, and Chicago Heights, Illinois, copies of the notice attached hereto marked Appendix A. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Thirteenth Region, shall, after being duly signed by the representative of Inland Steel Company, be posted by Inland Steel Company immediately upon receipt thereof and maintained by it for thirty (30) consecutive days thereafter and also for an additional thirty (30) consecutive days in the event of com-

pliance by the Union with the filing requirements of the Act, as amended, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Inland Steel Company to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Thirteenth Region aforesaid in writing, within ten (10) days from [fol. 446] the date of this Decree, and again within ten (10) days from the future date, if any, on which Inland Steel Company is officially notified that the Union has met the condition hereinabove set forth, what steps it has taken to comply herewith.

Dated this 28th day of October, 1948.

J. Earl Major, Judge, United States Circuit Court of Appeals for the Seventh Circuit; Otto Kerner, Judge, United States Circuit Court of Appeals for the Seventh Circuit; Sherman Minton, Judge, United States Circuit Court of Appeals for the Seventh Circuit.

[fol. 447]

#### APPENDIX A

Notice to all Employees: Pursuant to decree of the United States Circuit Court of Appeals enforcing a decision and order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees:

We will not refuse to bargain collectively with Local Unions Nos. 1010 and 64 of the United Steelworkers of America (CIO), as the exclusive representative of all of the employees in the bargaining unit described herein with respect to our pension and retirement policies, provided said labor organization complies, within the time allowed for such compliance by the decree of the Circuit Court of Appeals enforcing the said Order of the National Labor Relations Board, with Section 9 (h) of the National Labor Relations Act, as amended.

We will not make any unilateral changes in our pen-



sion and retirement policies affecting any employees in the bargaining unit without prior consultation with the Union, provided said labor organization complies within the time allowed for such compliance as above set forth, with Section 9 (h) of the National Labor Relations Act, as amended.

The bargaining unit is: all production, maintenance and transportation workers in our Indiana Harbor, Indiana, and Chicago Heights, Illinois, plants, excluding [fol. 448] foremen, assistant foremen, supervisory, office, and salaried employees, bricklayers, timekeepers, technical engineers, technicians, draftsmen, chemists, watchmen and nurses.

Inland Steel Company (Employer), by — — —  
(Representative), — — (Title).

Dated — — —.

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

[fol. 449] And on the same day, to-wit, the twenty-eighth day of October, the following further proceedings were had and entered of record, to-wit:

No. 9612

INLAND STEEL COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., et al.,  
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITIONS FOR REVIEW OF AN ORDER OF THE NATIONAL  
LABOR RELATIONS BOARD

On petition of counsel for the Inland Steel Company, one of the Petitioners in the above entitled cause, it is or-

dered by the Court that the certification and issuance to the National Labor Relations Board of the Final Decree, entered by this Court in this cause today, be, and the same is hereby, stayed for a period of thirty (30) days.

[fol. 450] And afterward, to-wit, on the second day of November, 1948, there was filed in the office of the Clerk of this Court a Joint Designation of Transcript of Record, which Designation is in the words and figures following, to-wit:

[fol. 451] IN THE UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT

No. 9612

INLAND STEEL COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 9634

UNITED STEEL WORKERS OF AMERICA, C. I. O., et al.,  
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

Joint Designation of Transcript of Record for Use in the  
Supreme Court of the United States

The Clerk of this Court is hereby requested to prepare a Transcript of Record, for use in the Supreme Court of the United States on the several petitions for Certiorari to be filed by the parties to this joint Designation of Transcript of Record, consisting of the following parts of the proceedings before the Court of Appeals in the above entitled consolidated causes, and to certify such Transcript as having been prepared pursuant to this Joint Designation:

1. An appropriate entry showing filing of Petition to Review and Set Aside an Order of the National Labor Relations Board, filed by petitioner Inland Steel Company [fol. 452] on April 30, 1948, in No. 9612, with reference to

Appendix to said Petitioner's Brief in No. 9612, filed June 26, 1948, as containing such petition.

2. Petition for Review, filed in No. 9634, by petitioners United Steelworkers of America, C. I. O., et al., on June 9, 1948.

3. Order of Court consolidating causes Nos. 9612 and 9634, entered June 11, 1948.

4. An appropriate entry showing filing by National Labor Relations Board of Transcript of Record of Proceedings before Board, filed June 14, 1948, with reference to the three Appendices filed respectively, by Petitioner in No. 9612 on June 26, 1948, by Petitioner in No. 9634 on June 26, 1948, and by Respondent National Labor Relations Board on July 14, 1948, stating that the said three appendices contain all material portions of such Record.

5. An appropriate entry showing filing of Answer of National Labor Relations Board to Petitions of Petitioners in No. 9612 and No. 9634 to review order of National Labor Relations Board filed June 21, 1948, with reference to Appendix to Petitioner's Brief in No. 9612, filed June 26, 1948 as containing such Answer.

6. Order entered June 23, 1948 granting United Steelworkers leave to intervene in No. 9612.

7. An appropriate entry showing filing of Appendix to Petitioner's Brief in Cause No. 9612, filed June 26, 1948, with reference to such Appendix certified under separate cover as a part of this Transcript.

8. An appropriate entry showing filing of Appendix to Petitioner's Brief in Cause No. 9634, filed June 26, 1948, [fol. 453] with reference to such Appendix certified under separate cover as a part of this Transcript.

9. An appropriate entry showing filing of Appendix to Respondent's Consolidated Brief in No. 9612 and No. 9634, filed July 14, 1948, with reference to such Appendix certified under separate cover as a part of this Transcript.

10. Order of July 21, 1948, of hearing and taking Cause under advisement.

11. Answer of National Labor Relations Board to petitioner's motion (in No. 9612) to strike certain matter from the Appendix to the Board's Brief, filed July 22, 1948.

12. Opinion of Court, filed Sept. 23, 1948.

13. Order of court on opinion, entered September 23, 1948.

14. Decree of Court, entered October 28, 1948.

15. Order staying mandate, entered October 28, 1948.
16. Copy of present Joint Designation of Transcript of Record.
17. Certificate of Clerk to the Transcript of Record.

Ernest S. Ballard, Merrill Shepard, 120 South La Salle Street, Chicago 3, Illinois, Attorneys for Inland Steel Company, Petitioner in No. 9612; [fol. 454] Arthur J. Goldberg, Frank Donner, Abraham W. Brussell, 718 Jackson Place, N. W., Washington 6, D. C., Attorneys for United Steelworkers of America, C. I. O., et al., Petitioners in No. 9634 and Intervenors-Respondents in No. 9612.

[fol. 455] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of papers filed and proceedings had in accordance with the joint designation of record filed in this Court on Nov. 2, 1948, in No. 9612, Inland Steel Company, Petitioner, vs. National Labor Relations Board, Respondent, and Cause No. 9634, United Steel Workers of America, C. I. O., et al., Petitioners, vs. National Labor Relations Board, Respondent, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifth day of November A. D. 1948.

Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.  
(Seal.)

[fol. 456] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 17, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is assigned for argument immediately following No. 336.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 457] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed January 18, 1949

It is hereby stipulated by the United Steelworkers of America, et al., petitioners, and by the National Labor Relations Board, respondent, that the printed appendix filed by United Steelworkers of America, et al. in the United States Court of Appeals for the Seventh Circuit, and the proceedings in that court heretofore printed by the Clerk of the United States Supreme Court, shall constitute the record in the above case in the Supreme Court.

Arthur J. Goldberg, Counsel for Petitioners; Philip B. Perlman, Solicitor General.

Dated: January 18, 1949.



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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1948**

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**No. 336 10**

**AMERICAN COMMUNICATIONS ASSOCIATION, CIO,  
JOSEPH P. SELLY, ETC, ET AL.,  
THE UNITED STATES OF AMERICA,**

*v.*

*Appellant,*

**CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL  
DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD, SECOND  
REGION**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK**

**STATEMENT AS TO JURISDICTION**

**VICTOR RABINOWITZ,  
Counsel for Appellants**

**NEWBURGER, SHAPIRO, RABINOWITZ & BOUDIN,  
Of Counsel.**

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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 46-405

AMERICAN COMMUNICATIONS ASSOCIATION, CIO,  
JOSEPH P. SELLY, INDIVIDUALLY AND AS PRESIDENT,  
JOSEPH P. KEHOE, INDIVIDUALLY AND AS SECRETARY-  
TREASURER OF AMERICAN COMMUNICATIONS  
ASSOCIATION, CIO, AND CLAUDIA EZEKIEL  
CAPALDO,

*Plaintiffs,*

*v.*

CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL  
DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD, SECOND  
REGION

*Defendant*

**STATEMENT AS TO JURISDICTION**

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, American Communications Association, CIO, Joseph P. Selly, individually and as President, Joseph P. Kehoe, individually and as Secretary-Treasurer of American Communications Association, CIO, and Claudia Ezekiel Capaldo, plaintiffs in the above entitled cause, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the order of the District Court.

This is an action brought by plaintiffs in the District Court of the United States for the Southern District of New York to enjoin the defendant who is Regional Director of the National Labor Relations Board for the Second Region, from enforcing the provisions of Section 9(h) of the National Labor Relations Act, as amended, Title 29 U.S.C.

Section 159(h), 61 Stat. 143; from conducting an election of employee representatives without placing the name of American Communications Association on the ballot, and from giving effect to a consent election agreement entered into over the protest and without the consent of plaintiff American Communications Association.

A three-judge statutory court was convened, pursuant to the provisions of Section 380a of Title 28 U.S.C. 50 Stat. 751. That statutory court on August 11, 1948, by a two to one decision entered an order dismissing the complaint on the merits and denying plaintiffs' motion for a interlocutory injunction, holding that the provisions of the statute challenged were valid and not repugnant to the Constitution.

#### **A. Statutory Provisions on Which Jurisdiction Rests**

The statutory provision which confers jurisdiction on the Supreme Court to review the order is Section 380a of Title 28 U.S.C. 50 Stat. 751, which reads as follows:

"No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in the hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately



two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination. Such application shall not be heard or determined before at least five days' notice of the hearing has been given to the Attorney General and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the petitioner unless a temporary restraining order is granted, the judge to whom the application is made may grant such temporary restraining order at any time before the hearing and determination of the application, but such temporary restraining order shall remain in force only until such hearing and determination upon notice as aforesaid, and such temporary restraining order shall contain a specific finding, based upon evidence submitted to the court making the order and identified by reference thereto, that such irreparable loss or damage would result to the petitioner and specifying the nature of the loss or damage. The said court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension, in whole or in part, until decision upon the application. The hearing upon any such application for an interlocutory or permanent injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall

take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of the law."

### **B. The Statute of the United States Involved in the Action**

The validity of Section 9(h) of the National Labor Relations Act, as amended, 29 U.S.C. 159(h), 61 Stat. 143, is challenged in this action on the ground that said section is repugnant to the Constitution of the United States. This provision reads as follows:

"9(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

### **C. Date of Judgment or Decree Sought to Be Reviewed and Date of Petition for Appeal**

The date of the judgment and order of the District Court here sought to be reviewed is August 11, 1948.

The petition for allowance of appeal was presented on August 18, 1948.

### D. Substantial Nature of the Question Presented

This is an action instituted by American Communications Association, CIO, Joseph P. Selly, individually and as President, Joseph P. Kehoe, individually and as Secretary-Treasurer of American Communications Association, CIO, and Claudia Ezekiel Capaldo. The suit was brought to restrain the Board from giving force and effect to Section 9(h) of the National Labor Relations Act, as amended, on the ground that this provision is repugnant to the Constitution of the United States in that it constitutes an impairment of the right of free speech and free assembly and is an infringement upon the rights of the plaintiffs and the other officers and members of the plaintiff labor organization to associate and join together for their common and lawful purposes, and that said section deprives the plaintiffs of liberty without due process of law, all in violation of the First, Fifth, Ninth and Tenth Amendments. The section is further attacked on the ground that it is vague, indefinite and uncertain in violation of the Fifth Amendment, and on the further ground that it constitutes a bill of attainder in violation of Article 1, Section 9 of the Constitution.

This action and the two companion actions which are similarly being appealed (*Wholesale and Warehouse Workers Union, Local 65 v. Doubs*, Civil Action No. 46-157, and *Esman v. Doubs*, Civil Action No. 46-729) are the first attacks in the Southern District of New York upon the validity of the requirements of the Taft-Hartley Act that labor organizations file the so-called "non-Communist affidavits" in order to be eligible to participate in proceedings before the National Labor Relations Board. To the best of our knowledge they are the only cases in the United States upon which appeals are currently being taken to the Supreme Court. A decision by the Supreme Court on the validity of these provisions is awaited by a substantial

number of labor organizations, both national and local. Only a decision by the Supreme Court can put at rest the many doubts and uncertainties which now prevail throughout the labor movement and which have caused numerous instances of industrial unrest.

This is not the first case before the Supreme Court in which this issue was raised. In *National Maritime Union v. Herzog*, Civil Action No. 4874-47, a proceeding was brought in the United States District Court for the District of Columbia to challenge the constitutionality of Sections 9(f), (g) and (h) of the Act, that union having failed to comply with any of those provisions. The Supreme Court held that Sections 9(f) and (g) were constitutional and expressly refrained from passing on the constitutionality of Section 9(h).

We do not believe that any serious contention will be made by the defendant that a substantial constitutional question is not herewith presented. As a matter of fact in *National Maritime Union v. Herzog*, the Solicitor General of the United States in filing a statement against the jurisdiction of the Supreme Court said: "The Board agrees with the appellant that the questions relating to the constitutionality of 9(h), the affidavit provision, are substantial in character and present issues of great public importance in the administration of the Act. The Board believes it to be in public interest that there be an early final determination of the constitutionality of this paragraph." In the argument before the District Court in this proceeding, likewise, counsel for the defendant conceded that the issue raised by the complaint was a substantial constitutional issue upon which the United States Supreme Court ought to pass.

The present case, like the two companion actions, stems from a petition for certification of representations filed by a rival labor organization: American Communications As-

sociation sought to intervene in the proceedings. The National Labor Relations Board refused to permit such intervention on the ground that American Communications Association had not complied with the provisions of Section 9(h). The Board proceeded to recognize a consent election agreement entered into between a rival labor organization and the employer without the consent and over the objection of American Communications Association.

The questions presented include the following:

(1) Whether the provisions of Section 9(h) abridge the rights of freedom of speech, press and assembly guaranteed to each of the plaintiffs by the First and Fifth Amendments to the Constitution.

(2) Whether the provisions of Section 9(h) constitute a bill of attainder in violation of Article 1, Section 9 of the Constitution.

(3) Whether the provisions of Section 9(h) are repugnant to the Constitution in that they are vague and indefinite in conflict with the requirements of the Fifth Amendment.

*1. Section 9(h) abridges the rights of freedom of speech, press and assembly guaranteed to each one of the plaintiffs by the First Amendment to the Constitution.*

Labor organizations and their members both are entitled to the exercise of the basic rights provided in the First Amendment to the Constitution. *Gompers v. Bucks Store & Range Co.*, 221 U. S. 418; *Thomas v. Collins*, 323 U. S. 516; *NLRB v. Jones & Laughlin*, 301 U. S. 1, 33, 34; *Texas & N. O. R. Co. v. Brotherhood*, 381 U. S. 548, 570; *Virginia Railway v. System Federation*, 300 U. S. 315, 543.

The complaint clearly indicates the manner in which these rights are denied to the plaintiff organization and its members. By denying to American Communications Association, CIO, the opportunity to participate in election pro-



ceedings while affording those opportunities to rival labor organizations, the basic rights guaranteed by the Constitution are impaired. If a rival labor organization is certified as a result of a proceeding in which American Communications Association is denied an opportunity to participate, American Communications Association is by the statute under consideration denied the right to strike (Section 8(b) (4) (C); Section 303(3)); or to obtain the assistance of other labor organizations in its dispute with an employer (Section 8(b) (4) ~~(B)~~; Section 303(2)). The statutory scheme in establishing a rival labor organization as the exclusive bargaining agency while denying to the plaintiffs the opportunity to qualify as such agency because of the political beliefs of the officers of the union results in an effective denial of the basic constitutional right to function and operate as a trade union.

The placing of the conditions contained in Section 9(h) upon the exercise of these basic rights constitutes a burden upon their exercise. Congress cannot forbid the enjoyment of a constitutional right nor can it burden or impair such right by indirection. *Thomas v. Collins*, 323 U. S. 516; *West Virginia v. Barnette*, 319 U. S. 624; *Lovell v. Griffin*, 304 U. S. 444; *Cantwell v. Connecticut*, 310 U. S. 300; *Grosjean v. American Press Co.*, 297 U. S. 233

Section 9(h) further violates the Constitution by adopting a test of guilt by association, a test which has been repeatedly disproved by the Supreme Court. *Schneiderman v. U. S.*, 320 U. S. 118; *Bridges v. Wixon*, 326 U. S. 135 (concurring opinion by Murphy, J.).

2. Section 9(h) constitutes a bill of attainder in violation of Article I, Section 9 of the Constitution.

Section 9(h) denies certain rights to unions whose officers are members or affiliates of a specifically named political

party. By naming that political party in the legislation under attack, Congress sought to make irrelevant the activities or beliefs of that party or of its members. Congress may not legislate the conclusion that an individual or a political party holds certain beliefs or promotes certain doctrines. This is basically a judicial function, and for Congress to take over this function constitutes a bill of attainder. *United States v. Lovett*, 328 U. S. 303; *Ex parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, 4 Wall. 277.

3. *Section 9(h) is repugnant to the Constitution in that it is vague and indefinite in conflict with the requirements of the Fifth Amendment.*

Legislation must conform to the requirements of precision and freedom from ambiguity that have been established as basic to our concept of due process of law. *Small Co. v. American Sugar Ref. Co.*, 267 U. S. 233; *Lanzetta v. New Jersey*, 306 U. S. 451.

Section 9(h) does not meet these requirements since its language is not sufficiently clear and unambiguous. Terms such as "affiliated," "believe in," "teaches," and "supports" are not susceptible of exact definition, and none of them furnishes such a clear standard of meaning as to meet the Constitutional requirements. No definition of any of these terms is provided in the Act and no interpretation is available either from context or usage. Yet a failure to understand these vague terms may subject one to a severe criminal penalty.

### Opinion of the Court

A copy of the opinion of the majority of the court and of the dissenting opinion of Mr. Justice Riskind filed June 29, 1948 is affixed hereto as Exhibit A.

**Conclusion**

It is thus clear that this appeal is within the exclusive jurisdiction of the Supreme Court and that substantial questions of widespread importance are involved, requiring the review of the judgment of the statutory court on the merits.

Respectfully submitted,

VICTOR RABINOWITZ,  
*Counsel for Plaintiffs.*

NEUBURGER, SHAPIRO, RABINOWITZ & BOUDIN,  
*Of Counsel.*

**EXHIBIT A****IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Civil Action No. 46-157

**WHOLESALE AND WAREHOUSE WORKERS UNION, LOCAL 65, an  
Unincorporated Association of More than Seven Persons,  
Affiliated with the UNITED RETAIL, WHOLESALE AND DE-  
PARTMENT STORE EMPLOYEES OF AMERICA, CIO, ARTHUR  
OSMAN, DAVID LIVINGSTON, JACK PALEY and THEODORE  
MARKOWSKI, Plaintiffs,**

*against*

**CHARLES T. DOUDS, Individually and as Regional Director  
of the National Labor Relations Board, Defendant**

Civil Action No. 46-405

**AMERICAN COMMUNICATIONS ASSOCIATION, CIO, JOSEPH P.  
SELLY, Individually and as President, JOSEPH P. KENOE,  
Individually and as Secretary-Treasurer of AMERICAN  
COMMUNICATIONS ASSOCIATION, CIO, and CLAUDIA EZEKIEL  
CAPALDO, Plaintiffs,**

*against*

**CHARLES T. DOUDS, Individually and as Regional Director  
of the National Labor Relations Board, Second Region,  
Defendant**

**Opinion of the Court**

SWAN, Circuit Judge:—In case No. 1 the facts disclosed by the amended complaint and the supporting affidavits are as follows:

Local 65 is a local union affiliated with the United Retail Wholesale and Department Stores Employees of America, CIO. It has over 13,000 members in and about the City of New York, consisting of workers employed in warehouses, wholesale, processing, and distributing establishments. It has approximately 1,000 collective contracts with various employers throughout the City.

On or about July 8, 1947, Local 65 entered into an agreement with F. W. Woolworth Company, concerning employment conditions for the company's warehouse employees. That agreement expires on July 8, 1948. On May 20, 1948, Local 804 of the International Brotherhood of Teamsters and Chauffeurs, A. F. of L. filed with the National Labor Relations Board, a petition to be certified as the representative of the employees of Woolworth. Local 804 and Woolworth, with the approval of the defendant, thereupon entered into an agreement for the holding of a consent election.

Local 65 has complied with Section 9(f) and (g) of the Taft-Hartley Act, but has not complied with Section 9(h); nor can it comply because one of its officers is a member of the Communist Party. The defendant has refused plaintiff's demand for a hearing and has refused to allow plaintiff a place upon the ballot for the election to be held, solely on the ground that plaintiff has failed to file the affidavits required by Section 9(h) of the Act. The election is to take place on June 30, 1948.

Local 65, its president, Arthur Osman, its vice-president, David Livingston, its secretary-treasurer, Jack Paley and Theodore Markowski, a member in good standing of Local 65, have brought this action to restrain the defendant individually and as Regional Director of the National Labor Relations Board from conducting the election, and have moved for an interlocutory injunction. The defendant has moved to dismiss the complaint for failure to state a cause of action.

In case No. 2 the facts are similar:

American Communications Association (for brevity called A. C. A.) is a national labor organization, affiliated with the CIO. On or about August 13, 1947, it entered into an agreement with Press Wireless, Inc., concerning employment conditions of the employees of the latter. The agreement provided that it should remain in effect until August 7, 1948, and thereafter from year to year unless notice in writing be given by either party of a desire to terminate the agreement, which notice must be given not less than sixty days prior to the end of any one year. No such notice was given by either of the parties.



In June of 1948, the Commercial Telegraphers Union, affiliated with the American Federation of Labor, filed a petition with the National Labor Relations Board, to be certified as the collective bargaining representative for the employees of Press Wireless. Like in case No. 1, an agreement between the employer and the rival union was made for the holding of a consent election, which was approved by the defendant.

Plaintiff has had neither a hearing nor is it to have a place on the ballot. The defendant's refusal to grant plaintiff a hearing or a place on the ballot is based solely on the ground that plaintiff has not complied with the requirements of Section 9(b) of the Act. The election is to be held between July 8 and July 23, 1948. The action is brought by A. C. A., two of its officers, and a member in good standing and the plaintiffs have moved for an interlocutory injunction. The defendant has made a cross-motion to dismiss the complaint.

Because of the short interval between the argument on the hearing and the time set for holding the election in case No. 1, it has been impossible to prepare an opinion which could discuss adequately the various legal issues presented for decision. But they are identical with issues considered at length in *National Maritime Union of America v. Herzog* by the United States District Court of the District of Columbia, which the Supreme Court affirmed on June 21, 1948 without, however, passing on the validity of § 9(b). For the sake of expedition we shall content ourselves with referring to the *National Maritime Union* opinion for the reasoning which supports our decision.

We hold first, as did that court, that the individual plaintiffs have no standing to sue. We deny Local 65's motion for interlocutory injunction. Two members of the court, Judge Rifkind disagreeing, entertain doubt whether irreparable injury will result to Local 65 from excluding its name from the ballot. Its members are entitled to vote at the election; if they constitute a majority of the employees in the collective bargaining unit, as they claim, it would seem that they can defeat the election of Local 804 and in that event the situation will remain legally exactly what it is now. But even if exclusion of Local 65 from the ballot is an adequate showing of irreparable injury, we all agree that

competing equities of greater weight justify refusal of an interlocutory injunction.

It is well established that when the right to an injunction is doubtful and the granting of a temporary injunction pending decision would work irreparable injury to a congressionally declared public policy, a court of equity will deny such relief. *Dryfoos v. Edwards*, 284 F. 596, 603 (S.D.N.Y.); *Yakus v. United States*, 321 U. S. 414, 441-2.

Finally, we sustain the constitutionality of § 9 (h) for the reasons set forth at length in the majority opinion in *National Maritime Union v. Herzog*, supra. Accordingly, the defendant's motion to dismiss the complaint is granted.

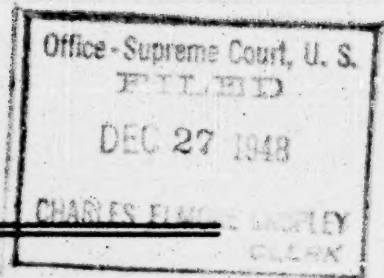
At the present time no order can be made in case No. 2. That case was brought on for argument with the other so speedily that there was no opportunity to give to the Attorney General the notice required by § 380a of the Judicial Code. Counsel for the plaintiffs proposed to attempt to procure a waiver of such notice by the Attorney General. In the event that such a waiver is hereafter filed, the case will be disposed of in conformity with the foregoing decision in case No. 1.

### **Dissenting Opinion**

**RIFKIND, District Judge, dissenting:**

Insofar as Section 9(h) of the Taft-Hartley Act excludes from the facilities of the National Labor Relations Board any labor union, one of whose officers is a member of the Communist Party or affiliated therewith, it is incompatible with the First Amendment. It abridges the freedom of speech and the right of assembly without a showing of clear and present danger. Indeed, on the argument the defendant disavowed the presence of clear and present danger. I would deny defendant's motion to dismiss the complaint.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1948 **149**

No. 886  
**10**

AMERICAN COMMUNICATIONS ASSOCIATION, CIO,  
JOSEPH P. SELLY, etc., et al.,  
*Appellant,*  
v.

CHARLES T. DOUDS, Individually and as Regional Director  
of the National Labor Relations Board, Second Region.

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**BRIEF FOR APPELLANTS**

---

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948

No. 336

AMERICAN COMMUNICATIONS ASSOCIATION, CIO,  
JOSEPH P. SELLY, etc., et al.,

*Appellants,*

v.

CHARLES T. DOUDS, individually and as Regional Director  
of the National Labor Relations Board, Second Region.

**BRIEF FOR APPELLANTS**

**Preliminary Statement**

Appeal is taken from an order of the District Court for the Southern District of New York, dismissing the complaint in the case here involved on motion of the defendant, and further denying a motion made by the plaintiffs for an interlocutory injunction. The order was entered on August 11, 1948.<sup>1</sup>

Because plaintiffs called into question the constitutionality of an Act of Congress, the case was heard by a three-judge statutory court convened pursuant to the appropriate provision of the Judicial Code, 28 U. S. C. 2282 and 2284 (28 U. S. C. 380-a prior to the recent revision effective September 1, 1948).

<sup>1</sup> Probable jurisdiction was noted on November 8, 1948.



## Opinions of the Court Below

The opinions of the Court are reported at 79 Fed. Supp. 563.

## Jurisdiction

The ground upon which the jurisdiction of this Court is invoked is that this proceeding raises the question of the constitutionality of an Act of Congress and therefore this Court has jurisdiction under the provisions of 28 U. S. C. 1253, 2282 and 2284.

## The Statute Involved

The Act of Congress in question is the Labor Management Relations Act of 1947, 29 U. S. C. 141 *et seq.*, 61 Stat. 136 *et seq.* (hereinafter referred to as the "Act") and specifically Section 9(h) thereof. That section reads as follows:

"9(h). No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

Sections 1, 8(b)(4)(C), 9(a), (e), (f) and (g), 10(e) and (l) of the Act likewise have a bearing on this case and are set forth in an appendix.

### Statement of the Case

The complaint alleges the following facts:

Plaintiff, American Communications Association (hereinafter referred to as "ACA"), is a national labor organization affiliated with the Congress of Industrial Organizations, having jurisdiction over employees in the communications industry (R. 1). It holds collective bargaining contracts covering such employees in New York and elsewhere throughout the United States (R. 2). Plaintiffs Joseph P. Selly and Joseph F. Kehoe are officers of ACA, and plaintiff Claudia Fzekiel Capaldo is a member of ACA and employed by Press Wireless, Inc. (hereinafter referred to as "Press Wireless") (R. 1).

The constitution of ACA provides, among other things, that there shall be no prejudice or discrimination against any member on account of race, color, sex or religious or political belief or affiliation, and all members are eligible to be elected officers of the union (R. 2).

Since 1944, ACA has been the collective bargaining agent of certain employees of Press Wireless and has entered into several collective bargaining agreements with said company since that date. The last of these agreements was entered into on or about August 13, 1947. That contract provided that it should remain in effect until August 7, 1948, and thereafter from year to year unless notice in writing be given by either party to the other of its desire to terminate not less than sixty days prior to the end of the then current term (R. 2, 3).

A substantial majority of the employees of Press Wireless covered by the aforesaid contract are members of ACA and desire to be represented by it for purposes of collective bargaining. Nevertheless, in or about the first

week of June 1948, the Commercial Telegraphers Union, a national labor organization affiliated with the American Federation of Labor (hereinafter referred to as "CTU") filed a petition for certification of representatives at the office of the National Labor Relations Board, Second Region, wherein it sought to be certified as the collective bargaining representative of the employees then covered by the contract between ACA and Press Wireless (R. 3).

The defendant, as Regional Director of the National Labor Relations Board, notified ACA of the filing of the petition and of the fact that ACA was designated as an interested party therein (R. 3). A conference was then held at the office of the defendant, at which there were present representatives of ACA, CTU, Press Wireless, and the defendant. At that time an agreement for a consent election was entered into between CTU and Press Wireless with the approval of the defendant and over the objection of ACA (R. 3, 4). ACA had filed the financial and other data required by Section 9(f) of the Act but had failed and refused to file the affidavits required by Section 9(h) of the Act (R. 5, 6).

The defendant advised ACA that since its officers had failed to file the affidavits required by Section 9(h), ACA had no right to demand a hearing, to object to the holding of an election or to appear on the ballot in the election which he intended to conduct (R. 5, 6).

ACA objected to the ruling of the defendant on the ground that the statute was unconstitutional, and on the further ground that the defendant had improperly construed and applied the Act, all to the injury of the plaintiffs. The defendant overruled the objections of ACA and proceeded with the arrangements for the conduct of an election (R. 6-9).

### Proceedings in the District Court

Plaintiffs moved for a preliminary injunction, seeking to restrain the Board from holding an election (R. 10). The election having already been held, plaintiffs sought to set the election aside, and to restrain the defendant from issuing a certification or giving effect to any certification that might be issued. The defendant moved, by way of cross-motion, to dismiss the complaint on the ground that it did not state facts upon which relief could be granted.

The Court, by a two-to-one decision, ~~denied the motion~~ for an interlocutory decree and granted the cross-motion to dismiss the complaint (R. 19, 20). The majority of the Court relied exclusively upon the majority opinion of the District Court for the District of Columbia in *National Maritime Union v. Herzog*, 78 Fed. Supp. 146. The decision in that case was affirmed by this Court in 334 U. S. 854 without reaching or considering the issues presented here. Judge Rifkind's dissenting opinion was as follows:

"Insofar as Section 9(h) of the Taft-Hartley Act excludes from the facilities of the National Labor Relations Board any labor union, one of whose officers is a member of the Communist Party or affiliated therewith, it is incompatible with the First Amendment. It abridges the freedom of speech and the right of assembly without a showing of clear and present danger. Indeed, on the argument the defendant disavowed the presence of clear and present danger. I would deny defendant's motion to dismiss the complaint" (No. 336, R. 21).

<sup>2</sup> In the *NMU* case, the plaintiff union had failed to comply with Sections 9(f) and (g) of the Act as well as 9(h). The defendants had urged in the District Court that the issue of the constitutionality of 9(h) need not be reached since 9(f) and (g) were constitutional and that a holding to that effect was sufficient to dispose of the case. The District Court found all three subdivisions of Section 9 to be constitutional. In a *per curiam* opinion, this Court said, on June 21, 1948, "The decision of the statutory three-judge court is affirmed to the extent that it passes upon the validity of Sections 9(f) and (g) \* \* \*. We do not find it necessary to reach or consider the validity of Section 9(h)."



### **Specification of Errors**

The plaintiffs intend to urge before this Court the following errors specified in the Assignment of Errors:

1. The Court erred in granting defendant's motion to dismiss the complaint and in dismissing the complaint.

2. The Court erred in failing to issue an interlocutory injunction as prayed by plaintiffs.

3. The Court erred in holding that plaintiffs Selly, Kehoe and Capaldo lacked capacity to sue.

4. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as repugnant to the Constitution of the United States in that it constitutes an impairment of the rights of free speech and free assembly and is an infringement upon the right of the plaintiffs and of the other officers and members of the plaintiff union to associate and join together for their common welfare and for the effectuation of their common and lawful objectives and aims, and is a denial of the liberty of the plaintiffs without due process of law, all in violation of the First, Fifth, Ninth and Tenth Amendments.

5. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as repugnant to the Constitution of the United States, in that it is vague, indefinite and uncertain and is a denial of the liberty of the plaintiffs without due process of law, all in violation of the Fifth Amendment.

6. The Court erred in failing to hold that Section 9(h) of the National Labor Relations Act as amended, Title 29 U. S. C. 159(h) is invalid as repugnant to the Constitution of the United States, in that it constitutes a bill of attainder in violation of Article 1, Section 9.



## ARGUMENT

### Summary of Argument

This case presents an issue of transcendent importance, and the decision of this Court may well determine the future of our democratic freedoms. For if legislation directed against one political belief is valid, legislation directed against any unpopular minority group is likewise valid, and democracy, as we understand it, no longer exists. The 80th Congress took a long step in the direction of such repression. It determined to eliminate certain unpopular minority groups wherever and however possible, and to that end Section 9(h) of the Labor Management Relations Act was enacted.

Section 9(h) requires, as a condition to a union's use of the facilities of the National Labor Relations Board, the execution by each of the officers of such union of an oath attesting to the fact that he does not maintain certain proscribed political beliefs or affiliations. Failure to take the oath, however, does not merely result in the loss of the benefits of the Act. It goes much further. For the processes of the Board, if invoked by an employer or a rival union, may be used against the non-complying union in such a manner as to deprive that union of basic rights and to make impossible performance of many of its basic functions, thus imperilling the very life of the union.

The first question posed to this Court is whether such a statute, aimed as it is against specific beliefs, deals with First Amendment rights. For if it does, the Government, in effect, concedes that it must be held unconstitutional, since it cannot meet the very strict tests applied by this Court in such cases.

Appellants contend that this statute goes to the heart of First Amendment rights. It seems clear beyond question that the First Amendment prohibits and was, in fact, de-

signed to prohibit, any governmental action which would inflict disabilities upon one because of his beliefs, speech or association. This statute does just that.

This Court has consistently held that freedom of belief is absolute, and legislation which imposes any disability based upon belief or its expression, must fall. This statute by its precise terms does effect such disability, and must, therefore, be held invalid.

The First Amendment guarantees the rights of free speech, press and assembly. These include the right of association and the right freely to select officers, establish a constitution and by-laws, and solicit members. A trade union is just such an association. Yet, should it exercise its constitutional rights of selecting a union officer who maintains the proscribed belief, the full impact of the sanctions of the Act is imposed against it, so as to frustrate the very purpose for which it was formed. The same effect is achieved if the officer of the union exercises his constitutional right to join or affiliate with the proscribed political party. Clearly, if this statute is declared constitutional, the right of association becomes a futile gesture.

The statute goes further—not only are plaintiffs' rights under the First Amendment violated by the imposition of sanctions on their exercise, but some of the very sanctions in and of themselves violate First Amendment rights. The exercise of the right of free speech and assembly, as expressed in forming an association, may result in the loss of free speech, as expressed in picketing in a labor dispute. Both are aspects of First Amendment rights and both are constitutionally protected. Under this law, a union cannot enjoy both. Yet either choice must result in a deprivation of its First Amendment rights.

It cannot be urged that Congress has here created a "benefit" and that access to that benefit can be withheld on any reasonable grounds. Access to a Government facility may never be conditioned upon giving up the protected

rights of free speech, press, association, religion or belief. Otherwise, these constitutional rights would have no meaning, because all Government facilities could then be granted or withheld upon condition of maintaining what the Legislature considered to be orthodox in belief, speech, or association.

The statute must be measured by the First Amendment tests set by this Court. It cannot meet those tests, for (1) there is no clear and present danger; (2) the statute is not narrowly drawn to eliminate a precise abuse causing a substantive evil. In fact, this statute neither defines nor eliminates any abuse. Instead, it imposes blanket sanctions against members of a proscribed political party, together with a broad and loosely defined group of persons based on their political beliefs or associations.

In considering this statute it must be borne in mind that statutes affecting First Amendment rights are presumed to be unconstitutional.

Second, the statute is so vague as to make it unconstitutional under both the First and Fifth Amendments.

Third, this statute also fails to meet the requirements of the Fifth Amendment in that it has no rational basis and hence cannot even meet the standards which the Government would apply. Section 9(h) adopts the arbitrary test of guilt by association and inflicts its penalties against those who are powerless to meet the conditions set by the statute.

Finally, the statute constitutes a bill of attainder in that it inflicts punishment against members of an easily ascertainable group by legislative action. The legislative history makes clear that the Act intended to inflict punishment rather than to set qualifications. In fact it used even the old form customarily adopted in legislation of this de-tested type—the expurgatory oath.

For the foregoing reasons, the statute is unconstitutional.

## Introduction

Many times in the past generation, the American people have looked to their Bill of Rights for protection against governmental action which they felt to be oppressive and offensive to their basic rights. Often the action complained of and the damage suffered thereby seemed trivial and scarcely worth the trouble and expense of litigation to the highest court of the land. And yet, each case, whether it involved a small license tax on an itinerant preacher, a permit for a leaflet distributor, an outwardly harmless ritual for a school child, or a registration ordinance for a trade union organizer, represented a small but significant attempt to abridge fundamental rights—and the Constitution gave protection.

In the course of these cases, there evolved certain minimal tests, by which any legislation touching upon these cherished freedoms must be measured. This Court has emphatically declared that these tests must be applied in all situations: whether the issues be great or small; whether the times be calm or tense; whether the causes be loved or hated; whether the doctrine be true or false. The smallest and most unpopular minority must get the same broad protection as the dominant majority. For the Court has recognized that the history of all nations has seen shameful periods of religious and political persecution, grounded in intolerance and fear, and that the Framers of the Constitution, in writing the Bill of Rights, sought to avoid such persecution in this land. Realizing, too, that when passions run high, it is difficult to establish principles based on reason, the Court has formulated those principles in time of comparative calm against a time of deep emotion.

These basic principles are:

1. Freedom of belief is absolute, and none can prescribe what shall be orthodox in matters of opinion or thought.

2. Freedom of speech, press and assembly designed to carry out those beliefs in practice is inviolate so long as its exercise does not result in "clear and present danger" to the community.

3. In matters affecting basic constitutional guaranties, this Court will look to substance, not form, and will not suffer their abridgement by indirection.

4. Statutes which affect these basic rights must be drawn "fastidiously", and must be limited to abuses which the legislature has the right to correct.

5. The presumption which operates generally in favor of the constitutionality of a law of Congress does not apply in the instance of a statute affecting First Amendment rights; in such cases there is a presumption against constitutionality of the statute.

Any fair application of these tests must result in a decision striking down this statute as surely as this Court has stricken down other legislation where the interests involved were, perhaps, of less national moment. For "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."<sup>3</sup>

Today, indeed, our country is faced with a wave of hate directed against a minority political belief. And the 80th Congress, joining in the current hysteria, has resurrected the long abhorred test oath, and has set political qualifications for those who would use Governmental facilities vital to their existence, and who would exercise other basic rights available to those who can and will take the prescribed oath.

Can the principles so firmly established in time of comparative calm give the protection for which they were created, or must they and, indeed, the entire Bill of Rights, crumble in time of great stress?

<sup>3</sup> *Bridges v. California*, 314 U. S. 252, 269.



Our confidence in the Constitution is not easily destroyed and we believe that its Bill of Rights can withstand major assaults by Congress as it has in the past withstood minor forays by a municipal legislature.

### **The Nature and Effect of the Statute**

The Labor Management Relations Act of 1947 made basic changes in our national policy with respect to the rights of employees to be represented by unions of their own choice, and to bargain collectively with their employers. The right to strike, recognized in this country for at least a hundred years, was severely limited. Widespread use of injunctions to prevent strikes, almost unknown in this country since the passage of the Norris-LaGuardia Act in 1932, has become the rule rather than the exception. The principle of limited union responsibility enacted by the Norris-LaGuardia Act has been substantially broadened. Damage suits have become a popular weapon in the arsenal of the employer and many such actions are now pending in the district courts.<sup>4</sup>

Closely integrated in the general scheme of the Act is Section 9(h). On its surface, that Section, standing alone, would seem merely to prevent a union from seeking the assistance of the National Labor Relations Board unless its officers had filed the required affidavits. In practice, however, the effect of Section 9(h) has been to impose against such "non-complying" unions the full force of the sanctions evoked by the Act. So effective are these sanctions and so devastating their use by employers and rival labor organizations that many non-complying unions have found and will in the future find it difficult, if not impossible, to survive. This is not because non-complying unions necessarily require the aid of the Board in bargaining collectively, but because the sanctions provided in the Act enable an employer or a rival complying union to use the

<sup>4</sup> See, for example, *Oppenheim Collins v. Carnes*, Civil No. 47-361, and *Schultze v. Strong*, Civil No. 47-637, both pending in the District Court for the Southern District of New York.

Board against a non-complying union so as effectively to prevent the latter from organizing or representing its members. This is true notwithstanding the fact that the non-complying union may represent the free choice of the employees concerned.

This result has been accomplished, first, by changing the eligibility requirements for certification, and second, by imposing drastic sanctions against a union which seeks to function in the face of a certification held by another union.

A brief comparison of the provisions of the old Act with those of the new will serve to illustrate. The National Labor Relations Act, prior to its amendment, provided in Section 9 that a labor organization might file a petition with the Board alleging that the organization represented a majority of the employees of an employer within an appropriate unit. The Board thereupon conducted an investigation to determine whether the petition raised a question over which it had jurisdiction. Unions, other than the petitioner, which showed an interest in the proceeding, were permitted to intervene, such intervention being automatic when the intervenor held a contract at the time the petition was filed or when it represented a substantial number of employees within an appropriate unit. When substantial issues were raised by any of the parties as to unit or other relevant matters, the Board directed that a hearing be held and that all parties be permitted to appear and participate. The Board then issued its decision and in appropriate cases directed the holding of an election. Where none of the parties to a proceeding raised a substantial issue the Board might proceed to an election either with or without the consent of the parties.<sup>5</sup>

<sup>5</sup> Each of the Annual Reports of the National Labor Relations Board has set forth the procedure followed in great detail. See, for example, the *Eleventh Annual Report* (1946), pp. 9-23. See also *National Labor Relations Board: Organization, Regulations, Procedure*, published pursuant to the provisions of the Administrative Procedures Act (Public Law 404, 79th Cong., 2d Session; 5 U. S. C. 1001) in the Federal Register on September 11, 1946 (11 F. R. 417A-619).

The new Act, in Section 9(h) provides that the Board may not investigate any question concerning representation of employees *raised by a union* unless each of the officers of *such* union and of its parent body had filed an affidavit to the effect "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

The Board, in its application of the amended Act, has extended the effect of Section 9(h) to a point beyond that anywhere required by its specific language.\* The Board has not only refused to entertain petitions filed by a non-complying union which thereby raise questions concerning representation. Where a petition is filed by a complying union, and a non-complying union seeks to intervene,

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\* A serious issue of statutory interpretation is raised by the record, but was not included in the statement of points which appellant has heretofore filed in this Court, and will not be argued here because this Court, by inference, seemed to have decided the point adversely to the appellant in its decision in *NMU v. Hersog*, 334 U. S. 854. However, because that case was not argued fully before this Court and because the statutory question involved may not have been called to the Court's attention, we mention it here.

It will be noted that Section 9(h) declares that the Board shall make no investigation "of any question affecting commerce concerning the representation of employees, *raised by a labor organization* under subsection (c) of this section." (Emphasis supplied.) It nowhere prohibits the Board from permitting intervention by a union which has failed to file the affidavits required by Section 9(h) in a proceeding in which the question concerning representation was raised by a petition filed by an employer or by a rival labor organization; nor does it prohibit the Board from issuing a certification in favor of a non-complying union. In the case before the Court, the plaintiff union did not raise any question concerning representation. It did not file the petition before the Board and it did not request any action by the Board. The question concerning representation was raised by CTU. It would seem, therefore, that under a strict construction of the statute, the Board was unjustified in denying leave to intervene to the plaintiff union. The rationale for the Board's policy in denying to a non-complying union leave to intervene in a

the Board has held that the non-complying union may not do so unless it has a contract which will operate as a bar to the proceeding (*Matter of Oppenheim Collins & Co. Inc.*, 79 NLRB No. 59).<sup>7</sup>

Absent such a contract, the inability of a non-complying union to intervene means that it cannot secure a hearing on any issue (*Matter of Precision Castings Co.*, 77 NLRB No. 33); it cannot secure a place on the ballot (*Matter of Sigmund Cohn & Co.*, 75 NLRB No. 177); it cannot object to the conduct of an election (*Matter of Times Square Stores*, 79 NLRB No. 50); and, of course, it cannot be certified.

All of this is true even where the intervenor has for years represented the employees (*Matter of Precision Castings Co.*, supra; the situation of ACA in Case No. 336) or where the intervenor represents a clear majority of the workers.

Where, as in the case now before the Court, the intervening union has not complied with the Act, the Board holds an election with only the name of the complying union on the ballot. With their preferred candidate not on the ballot, employees who wish some union representation will, under normal circumstances, vote for the only union which is on the ballot. It becomes clear, therefore, that regardless of the fact that a non-complying union may represent the free choice of a majority of the employees involved, it may not secure certification from the Board, but

case where the petition was filed by an employer or a rival labor organization is set forth in the Board's opinion in *Matter of Herman Loewenstein*, 75 NLRB No. 377. The Board relies, not on any provision of the Act, but on the policy which it believes Congress intended in passing the Act. Quite aside from the question presented as to how the Board knew about the unexpressed policy of Congress, we submit that no administrative agency may modify the express terms of an unambiguous statute because it believes that Congress intended such modification.

<sup>7</sup> Cf. *Fay v. Douds*, 78 Fed. Supp. 703; 79 Fed. Supp. 582, where leave to intervene was denied even though the union claimed that it had such a contract.

certification may, in that very instance, run to a non-complying union.

The issuance of such a certification brings into operation the sanctions created by other provisions of the Act. Section 8(b)(4)(C) makes it an unfair labor practice for a union to call a strike for the purpose of compelling an employer to bargain with it when another union has been certified as the collective bargaining representative of the employees of such employer. Section 10(1) provides drastic sanctions for a violation of Section 8(b)(4)(C): where a charge has been filed by an employer alleging a violation of that section, and where the Regional Director "has reasonable cause to believe such charge is true," the Regional Director shall petition the United States District Court for appropriate injunctive relief pending the final adjudication of the merits of the charge by the Board. *Douds v. Local 1250, Department Store Employees Union*, F. (2d) \_\_\_\_\_, Court of Appeals, 2d Circuit, November 8, 1948, not yet officially reported (23 LRRM 2045); *Brown v. Oil Workers Union*, \_\_\_\_\_ Fed. Supp. \_\_\_\_\_, Dist. Ct., Northern Dist., Calif., October 27, 1948, not yet officially reported (23 LRRM 2016). Upon such final adjudication, a permanent cease and desist order may issue from the Court of Appeals pursuant to Section 10(c).

Section 303(a)(3) supplements Section 8(b)(4)(C) by giving to the employer a private action for damages against a union guilty of the unfair labor practice therein described.\*

\* There are still other effects of non-compliance. A non-complying union may not file charges under Section 8(a) of the Act and hence cannot compel an employer to bargain with it. *Inland Steel Co. v. National Labor Relations Board*, 170 F. (2d) 247, application for certiorari now pending. A non-complying union may not file a petition under Section 9(e) of the Act, and hence may not sign a union shop contract. Such contracts have been in effect for many years in some industries, antedating the Wagner Labor Relations Act by many years. In the maritime, mining and printing industries, bitter strikes have occurred since the passage of the Act involving, at least in part, this issue. See *Evans v. International Typographical Union*, 76 Fed. Supp. 881; New York Times, July 6, 1948; New



The effect of the statute can best be illustrated by a consideration of the case now before the Court.

As we pointed out above, ACA had held collective bargaining rights and had in fact represented the employees of Press Wireless for years prior to the Act. After the denial of the motion for a temporary injunction in this case, the Board proceeded to hold an election, ACA not being given a place on the ballot. The employees were given a choice of voting either for or against CTU. Rather than run the risk of losing all rights to bargain collectively, the employees selected the one union appearing on the ballot, although that would not have been their free choice had such a choice been offered to them. The CTU was certified on July 30, 1948. *Matter of Press Wireless*, 2-RC-462. After that date, ACA not only was deprived of the right to act as exclusive representative of all the employees, given by the old Act to unions representing the free choice of the majority; it further lost its common law rights to represent its own members and to compel Press Wireless to bargain with it, if necessary by striking—rights which antedated the Wagner Act by many years.

Obviously an extension of the procedure followed by the Board here could easily operate to wipe out this union in short order. Indeed the exact situation presented in these cases has been repeated many times in the past year.\*

York Times, September 3, 1948; See report of Board of Inquiry, *In re the Maritime Industry*, August 13, 1948, published at 10 L. A. 859. In the absence of authorization to sign a union shop contract under Section 9(e), there is some doubt as to the legality of a union hiring hall, and the National Labor Relations Board has so held in *Matter of National Maritime Union*, 78 NLRB No. 137. On occasion, State courts have even issued sweeping injunctions in labor disputes, on the ground that the officers of the union involved had not filed the affidavits required by Section 9(h). Plaintiff ACA has been the victim of two such decrees. *Cleland Simpson Co. v. ACA*, Penn. Ct. of Common Pleas, November 11, 1947, not officially reported (21 LRRM 2059); *Syranton Broadcasters, Inc. v. ACA*, Penn. Court of Common Pleas, November 11, 1947, not officially reported (21 LRRM 2024).

\* See footnote on opposite page.

## POINT I

**SECTION 9(h) EFFECTS AN UNCONSTITUTIONAL ABRIDGMENT OF THE RIGHTS GUARANTEED BY THE FIRST AMENDMENT.**

The First Amendment to the Constitution of the United States provides that Congress shall make no law abridging the rights of free speech, press, or assembly. It would seem clear beyond question that legislation such as that here involved, which imposes disabilities and serious sanctions against one because he maintains what Congress deems to be unorthodox in belief, association, or speech, must fall within this broad prohibition. Nevertheless, the Government here urges that First Amendment rights are not affected by this statute. In fact, it concedes that if the Court should find that this legislation does concern First Amendment rights, the statute must fall, for it admittedly fails to meet the very stringent tests placed upon such legislation.

In an effort to avoid meeting those tests, the Government seeks to whittle down the broad prohibitions of the

\* ACA has already suffered severe losses as a result of the operation of the Act. The following cases pending before or decided by the NLRB are substantially identical with the one before the Court: *Matter of Greater New York Broadcasting Co.*, 2-RC-612; *Matter of Wodaam Corporation*, 2-RC-743; *Matter of Triangle Publications*, 2-RC-156; Cf. *ACA v. Schauffler*, 80 F. Supp. 400.

The matter of *Osman v. Douds*, No. 404 on the docket of this Court, presents a situation similar in some respects to that before the Court here. The union involved there, Local 65, has had an even greater number of cases before the NLRB in which the same issue was raised. See *Matter of Sigmund Cohn, Inc.*, 75 NLRB No. 177; *Matter of F. W. Woolworth Co.*, 2-RC-381; *Matter of Dadourian Export Corp.*, 2-RC-647; *Matter of Defiance Button Machine Co.*, 2-RC-568; *Matter of Enright-LeCarboniec, Inc.*, 2-RC-554; *Matter of E. Feibusch & Co.*, 2-RC-579; *Matter of H. MacCaulis Co., Inc.*, 2-RC-580; *Matter of J. J. Newberry Co.*, 2-RC-609; *Matter of Acme Brands, Inc.*, 2-RC-637; *Matter of Wholesale Merchandise Corp.*, 2-RC-640; *NLRB v. Prosper Brozen*, 166 F. (2d) 812; *Wholesale and Warehouse Workers v. Douds*, 79 Fed. Supp. 563. Probable jurisdiction in *Osman v. Douds* has not yet been noted by this Court.

**First Amendment.** The Government contends that First Amendment rights are not the subject of the statute but that its subject is merely the regulation of a Government facility; therefore, Congress could condition the use of such facility on one's belief, religious or political, or on one's speech or association, should it find any rational basis for such condition.

Appellants shall demonstrate below that in so arguing the Government mistakes form for substance, for the effect and, indeed, the purpose of the statute is to limit the full exercise of rights guaranteed by the First Amendment. Therefore, the statute must be held unconstitutional.

**A. Freedom of belief is absolute. Section 9(h) effects an unconstitutional infringement of that right.**

The oath required by Section 9(h) comprises several elements. The affiant is required to swear

- (1) that he is not a member of the Communist Party;
- (2) that he is not "affiliated with" the Communist Party;
- (3) that he does not believe in any organization that believes in, or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods (emphasis supplied);
- (4) that he is not a member of any such organization;
- (5) that he does not "support" any such organization.

The precise meaning of some of the elements of the required oath is by no means clear and, as will be pointed out in Point II, *infra*, that in itself is an element of unconstitutionality in the statute. But, whatever may be the meaning of words such as "affiliated with" or "support," it is obvious that the oath, and certainly element (3) above, constitutes an interference with freedom of belief. The affiant is not required merely to swear that he will not engage in or is not presently engaged in certain proscribed

conduct. Nor is he required merely to attest to his willingness to refrain from advocating proscribed action or teaching proscribed doctrine. He is required to attest to a specific belief; upon his inability or unwillingness to do so, the full weight of the sanctions of the Act is imposed.

The oath likewise constitutes an interference with the freedom of belief of the union, for one of the statutory standards relates to the belief of any organization (including the union itself) to which the officer may belong. Should the union itself hold and express any of the proscribed opinions, the sanctions of the Act must automatically follow, since none of its officers or members could take the required oath, whatever their personal beliefs, by reason of elements 4 and 5 of the oath.

The First Amendment "embraces two concepts—freedom to believe and freedom to act." *Cantwell v. Connecticut*, 310 U. S. 296, 303. Although freedom to act is subject to some limitations, there is virtual unanimity in the decisions of this Court that freedom of belief is absolute in the fullest sense of the word. "Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind." *Jones v. Opelika*, 316 U. S. 584, 618, dissenting opinion adopted as majority opinion at 319 U. S. 103.

See also *Minersville v. Gobitis*, 310 U. S. 586, dissenting opinion at page 601.

For, whatever may be the circumstances which will justify legislative interference with the freedom of action referred to by the Court, there can be no circumstances which will justify legislative interference with freedom of belief and freedom of thought. *West Virginia Board of Education v. Barnette*, 319 U. S. 624.

As Thomas Jefferson aptly remarked, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neigh-

bor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg." <sup>10</sup>

He cautioned "that it is time enough for the rightful purposes of civil government, for its offices to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them." <sup>11</sup>

While the most tyrannical government is powerless to control the workings of the mind, it is likewise true that since the dawn of civilization, tyrannical governments have made the attempt. Lacking the power to control thought, such governments have sought to do what is next best—to eliminate heretics, both religious and political. In other lands, without our tradition of democracy, imprisonment or death has often been the lot of the articulate dissenter. But man's ingenuity, whether for good or evil, is virtually limitless, and where a deep-seated democratic heritage makes such extreme measures politically impossible, more subtle forms are devised, perhaps in contemplation of the day when the walls will have been breached sufficiently to allow more effective and direct action.

The 80th Congress has here taken a long step down the road to enforced conformity. All those who seek to exercise rights which would otherwise be available to them must first attest to the orthodoxy of their political beliefs. This legislation goes far beyond that declared invalid in *West Virginia v. Barnette*, 319 U. S. 624. In that case, it was sought merely to compel children to affirm a belief, whether in fact they held it or not. It imposed no sanc-

<sup>10</sup> *Notes on Virginia*: Writings of Thomas Jefferson, Ford, Paul L., ed. III, p. 263.

<sup>11</sup> Preamble to Virginia Statute for Establishing Religious freedom, Ford, op. cit. III, 239.



tions for a false affirmation. Section 9(h) is far more restrictive. Not only must a trade union officer take an oath that he believes what he may not, in order to secure advantages which are open only to true believers, but should he swear falsely he is subject to severe criminal penalties.

Here we have the test oath "so odious in history" which even the dissenting opinion in the *Barnette* case agreed was repugnant to our Constitution.

"\* \* \* the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. \* \* \* Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution." (*West Virginia v. Barnette*, 319 U. S. 624, dissenting opinion at p. 663.)

In the case at bar, indeed those who must conform are not free "to believe what they choose" or "to disavow [their oath] as publicly as they choose to do so," save on risk of being convicted of perjury.

That beliefs and opinions in the nature of things cannot be curbed has been recognized, not only by our Court, but by the Framers of the Constitution. Thomas Jefferson, in the preamble he wrote for the Virginia Statute Establishing Religious Freedom, said:

"Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his

supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet choose not to propagate it by coercions on either, as was in his ~~Almighty~~ power to do, but to exalt it by its influence on reason alone; \* \* \* that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, \* \* \* " 12

This principle of the inviolability of opinion is a constantly recurring theme, not only in the writings of Jefferson, but in those of Madison as well. In his "Memorial and Remonstrance to the Honorable the General Assembly of the Commonwealth of Virginia", he echoed Jefferson:

"This right [to exercise his conviction and conscience] is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men:" 13

*The Virginia Report of 1799-1800 Touching the Alien and Sedition Laws* reports the views of John Taylor of Caroline arguing against the Sedition Laws in the Virginia House of Delegates on December 13, 1798:

"The right of opinion, he said should be held sacred. It ought never to be given up in any one instance. Religion was only a branch of opinion. With what propriety could that range of thought, bestowed by the Creator upon the human mind, be controlled by law? He deemed it a sacrilege for government to undertake to regulate the mind of man. It was a subject by no means within its powers. What would

<sup>12</sup> Ford, Paul L.: op. cit. III, 238.

<sup>13</sup> Hunt: Writings of Madison, II, 184.

be the consequence of such a measure? Universal ignorance amongst the people. He then asked, if ignorance was a desirable thing? And were the free exercise of the faculties of the human mind, to be once restrained and shut up, he would ask them, then, what was man? He was therefore opposed to those laws, as being destructive of the most essential human rights."<sup>14</sup>

It is easy to understand the passionate feelings of the Framers of the Constitution and their contemporaries against test oaths or any other restriction or intrusion on their freedom of belief. For simultaneous with the settlement and growth of the Colonies, there was raging in England a long battle for religious and political freedom—a battle which lasted until well after the American Revolution. In the famous decision in *Edward's Case*, 13 Co. Rep. 9, 77 Eng. Rep. 1421, Lord Coke had expressed the progressive views of his time, later adopted by the Colonists. In issuing a writ of prohibition against the Ecclesiastical Courts, he said:

"It was resolved, that the Ecclesiastical Judge cannot examine any man upon his oath, upon the intention and thought of his heart, for *cogitationis poenam nemo emeret*. And in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intention or thought of his heart; and if every man should be examined upon his oath, what opinion he holdeth concerning any point of religion, he is not bound to answer the same; for in time of danger, *quis modo tutus erit*, if every one should be examined of his thoughts. And so long as a man doth not offend neither in act nor in word any law established, there is no reason that he should be examined upon his thought or cogitation; for it hath been said in the proverb, *thought is free*! \* \* \*." (Emphasis in original.)

The struggle for supremacy in England between the Stuarts and Commons was fresh in the minds of the Colonists at the time of our own Revolution. They remembered

<sup>14</sup> Randolph ed. (1850), pp. 26-27.

the test oaths and bills of attainder which had been adopted by both sides as convenient methods of repression in that contest, and remnants of such evils were still in evidence and were much feared by them. They remembered, too, that the history of our own country had likewise been blackened by similar forms of intolerance. The heresy trial of Anne Hutchinson referred to by Mr. Justice Black in his dissent in *Adamson v. California*, 332 U. S. 46, 88, was not the only instance of its kind in New England. Roger Williams preceded her into exile; Mary Fisher, Anne Austin and scores of other Quakers followed her.<sup>15</sup>

Thus, the enemies of Franklin made political capital of the charge, probably ill-founded, that he intended to introduce the test oath into the Colonies.<sup>16</sup> Thus, Jefferson referred to the religious test oaths of Virginia as "religious slavery."<sup>17</sup> When in 1776 the radicals of Pennsylvania adopted a Test Act, it was generally condemned by liberals both in the Colonies and in England.<sup>18</sup>

Such devices are no less abhorred today, and this Court has been no less zealous and eloquent than Coke and Jefferson in condemning them.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*West Virginia State Bd. of Edu. v. Barnette*, 319 U. S. 624, 642.)

<sup>15</sup> For a thorough description of religious persecutions in New England, see Wertenbaker, Thomas J.: *The Puritan Oligarchy* (1947). As Professor Wertenbaker points out, the religious controversies in the Massachusetts Colony were inextricably interwoven with political affairs.

<sup>16</sup> Miller, John C.: *Origins of the American Revolution* (1943) 136; Cf. also p. 189.

<sup>17</sup> Notes on Virginia, Ford, Paul L.: op. cit. III, 263.

<sup>18</sup> Miller, John C., *Triumph of Freedom* (1948), p. 351.

**B. The right of the plaintiff union and its members to organize and to select their own officers, and the right of all of the plaintiffs to express such views and join such associations as they desire, are protected by the First Amendment which guarantees freedom of speech, press and assembly. These freedoms are impaired by Section 9(h).**

The right of free assembly guaranteed by the First Amendment to the Constitution encompasses the right of persons to meet together and to form associations to further their mutual interests. It is not limited to the right to meet and express views. It includes the freedom to set up organizational machinery, to adopt such constitutions and by-laws, and to elect such officers as the assembly may deem proper.

A trade union is just such an association of persons with common views and common objectives. And, indeed, in associating together for their mutual aid and in enlisting the aid of others, the members are organizing for a purpose which has long been recognized as socially useful. *United States v. Cruikshank*, 92 U. S. 542; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418; *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1; *Hague v. Congress of Industrial Organizations*, 307 U. S. 496; *Cf. American Federation of Labor v. Watson*, 327 U. S. 583.

Employees have as clear a right to organize and select representatives and officers of their own choosing as an employer has to organize its business and select its own officers and agents, or as farmers, educators, churchgoers, or political party members have the right to assemble and select theirs.<sup>19</sup> *National Labor Relations Board v. Jones*

<sup>19</sup> Pursuant to this fundamental right, the union before the Court in this proceeding, in framing its own constitution, followed in the footsteps of those who framed our national Constitution; it has provided that no person may be deprived of membership or the right to hold office because of his race, color, sex or religious or political belief or affiliation (R. 2).



& *Laughlin, supra*; *Thomas v. Collins*, 323 U. S. 516; *Bowe v. Secretary of Commonwealth*, 320 Mass. 230; *Local 309 WFLA-CIO v. Gates*, 75 Fed. Supp. 620.<sup>20</sup>

Here, Congress has abridged that right. By imposing severe penalties on what it decreed to be an improper or unorthodox selection, it has made any free choice illusory. For the penalties mean the loss of the right to represent workers in collective bargaining and to carry on other fundamental economic activities which are the basic functions of a trade union. The right "to organize, select a bargaining agent of their own choosing and elect officers of the Union have been reduced to a state of meaningless gesture" (Major, J., dissenting, in *Inland Steel Workers v. NLRB*, 170 F. (2d) 247, 258).

Likewise, the exercise of the right of the union officer to freely assemble and join such lawful associations as he desires is seriously impaired. For should he exercise that right and join a proscribed organization, his union may be so adversely affected as to render him a burden rather than an asset to it, despite the fact that he maintains all the qualifications of good leadership. Thus, the exercise of his constitutional right may result in loss of his chosen vocation by legislative decree.

Freedom of speech and press are likewise impaired by this statute, the restraints applied being aimed primarily at free political discussion. This, despite the fact that perhaps the most fundamental purpose of the Bill of Rights was to insure free political expression. As Justice Brandeis stated in *Whitney v. California*, 274 U. S. 357, 375:

"Those who won our independence . . . recognized the risks to which all human institutions are subject. But they knew that order cannot be secured

<sup>20</sup> See also Laski, Harold J., *Freedom of Association*, 6 Encyclopedia of the Social Sciences (1931), page 447; Wyzanski, Charles E., Jr., *The Open Window and The Open Door*, 35 Calif. Law Rev. 336.

merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."

In *DeJonge v. Oregon*, 299 U. S. 353, at page 365, the Court said:

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

See also: *Stromberg v. California*, 283 U. S. 359, 369; *United States v. C.I.O.*, 335 U. S. 106, concurring opinion at page 144.

As Justice Brandeis pointed out, these considerations were predominant in the minds of the Framers of the Constitution. The letter of the Continental Congress addressed to the inhabitants of Quebec on October 26, 1774, so often cited by this Court, stated:

"The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments in the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are ashamed or intimidated into

more honourable and just modes of conducting affairs." *Journals of Continental Congress, 1774-1789* (34 vol. 1904-1937) I, 1904, pp. 104-108.

Madison, in his report on the Virginia Resolutions against the Alien and Sedition Law of 1798 stated:

"Of this act it is affirmed—1. That it exercises, in like manner, a power not delegated by the Constitution; 2. That the power, on the contrary, is expressly and positively forbidden by one of the amendments to the Constitution; 3. That this is a power which, more than any other, ought to produce universal alarm, because it is levelled against that right of freely examining public character and measures, and of freely communicating thereon, which has ever been justly deemed the only effectual guardian of every other right." IV Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836), 561.

Thus, inherent in the rights of free speech and assembly is the right freely to express views on political issues. And, in the course of the past century, the trade union movement has, to an ever increasing extent, exercised that right. As business interests have made their voice heard in politics, workers have realized their need to do the same. Just as workers have realized that they must act in concert to further their economic welfare, so have they realized that they must act in concert to most effectively express their political views. Indeed, as government participated more and more in the economic life of our country, the struggle for economic security took on a double aspect—political as well as economic. Workers most naturally turned to the organization which they had formed to further their economic interests—their trade union. Accordingly, the leaders of trade unions necessarily became participants in the political life of their community and it became increasingly common for members to choose them because of their ability on the political as well as on the economic

front. So today participation in politics has become a generally recognized and accepted aspect of trade union work. Cf. *United States v. CIO*, 335 U. S. 106.<sup>21</sup>

Obviously, however, political freedom cannot be exercised effectively if some political views are by Congressional fiat forbidden, or if those who express such views suffer the penalty of being deprived of sorely needed rights. A union which holds or expresses proscribed beliefs subjects itself to all of the disabilities and sanctions provided in the Act, for the officer of the union, being a member of it, could not take the required oath. Moreover, the right of the union officer to freely express his own political views is severely limited, for if in the exercise of that freedom he expresses proscribed beliefs, he is subject to the same penalties as he would be for joining a proscribed organization.

It should further be noted that the sanctions provided in the Act upon the exercise of these First Amendment rights are in themselves violative of the guaranties of that Amendment. For, as pointed out above, certification of a rival union is almost inevitably the result of denying a

<sup>21</sup> For a general discussion of the role labor has played in politics, see:

Beard, *The American Labor Movement, A Short History* (1935), pp. 33-46, 54-61, 80-85, 103-112, 165-171; Commons and Associates, *History of Labor in the United States*, Vols. I and II (1918), Vol. I, pp. 169-335, 369, 454-471, 522, 535, 548-559; Vol. II, pp. 85-109, 124-130, 138-146, 153-155, 168-171, 240-251, 324, 341-342, 351-353, 461-470, 488-493; Foner, *Labor Movement in the United States* (1947), pp. 104-105, 130-134, 140, 149-166, 210-217, 245-248, 262-263, 334-336, 357-359, 372-373, 423-429, 475; Gaer, *The First Round* (1944); Millis and Montgomery, *Organized Labor* (1945), pp. 7, 10, 27, 29-31, 34, 42n, 51, 52n, 54-55, 57n, 62, 67, 71, 81, 91, 108-111, 118, 123-129, 141, 143, 149, 178, 181-188, 232-238, 303-305, 311, 313, 317-320, 348-349, 600, 669, 829, 890; Schlesinger, *The Age of Jackson* (1945), pp. 132-158, 180-185; Taft, *Labor's Changing Political Line*, 43 *Journal of Pol. Ec.* 634 (1937); Walsh, C. I. O., *Industrial Unionism in Action* (1937), pp. 248-271.

place on the ballot to a non-complying union, despite the fact that the latter may represent the free choice of a majority of the employees. Upon such certification, the non-complying union may not, under Section 8(b)(4)(C) of the Act, call upon the employees to strike or to take any collective action. The National Labor Relations Board has elsewhere urged, and at least one Court has held, that the right to picket for the purpose of publicizing the nature of the dispute is likewise prohibited. *Douls v. Local 1250, Department Store Employees Union*, \_\_\_\_\_ Fed. Supp. \_\_\_\_\_, October 8, 1948, not yet officially reported (22 LRRM 2601). But the action thus prohibited by the statute is itself constitutionally protected under the First Amendment. *Thornhill v. Alabama*, 310 U. S. 88; *Thomas v. Collins*, 323 U. S. 516.

Thus, one set of rights is placed in opposition to another. If a union would enjoy freedom of belief, speech and press, if it would exercise its freedom of assembly by electing its own officers, it may do so only at the risk of surrendering other equally fundamental rights—the right to organize, to picket, and to carry on other normal trade union activities. Under this statute the union may not exercise both rights. It is difficult to conceive of legislation which more effectively intrudes upon the rights included in the broad protection of the First Amendment.

Indeed, this statute not only abridges the freedoms protected by the First Amendment but it equally violates those guaranteed by the Ninth and Tenth Amendments as well. For neither Congress nor the States may deny the right of the people to engage in political activity, such rights having been specifically reserved to the people. *United Public Workers v. Mitchell*, 330 U. S. 75, 94; *The Federalist*, No. 84.



**C. The First Amendment freedoms must be broadly construed; the Government's attempt to limit those freedoms can find no support in the history of the Amendment or the decisions of this Court.**

Legislation affecting First Amendment rights is subject to severe scrutiny and is required to meet the very stringent tests set by this Court in order to be sustained. The Government, in this case, makes no effort to meet such tests. Confronted, we believe, by the fact that this requirement cannot be met here, it resorts to the sophism that this legislation does not affect rights protected by the First Amendment, claiming that the First Amendment is peculiarly limited in the protection that it gives.

While the Government urged in the Court below that the protection afforded by the First Amendment cannot be extended to cover statutes such as that here involved, it nowhere clearly defined the limits of the Amendment. In its attempt to distinguish this case from a long list of cases in which this Court has stricken legislation as violative of the First Amendment guaranties, it defined the latter cases as those "which imposed censorship upon speech or assembly, or restricted the occasion for permissible exercise of these rights, or punished individuals for having published their views, or for having joined an association." (Government brief in *NMU v. Herzog*, p. 46, submitted to the Court below in this case.) The Government then urged that the legislation at hand does not come within that definition.

In a later version of the same argument presented to the Court of Appeals in *Inland Steel Co. v. NLRB*, 170 F. (2d) 248, now No. 431 on the docket of this Court, this formulation was expanded somewhat. There the Government described the First Amendment cases it sought to distinguish as involving action "which imposed a prior restraint upon speech, press, or assembly, or which restricted the occasion for permissible exercise of these rights, or which granted facilities for the dissemination of certain

views, or for the gathering of certain associations, which were denied to others, or which punished individuals for having published their views or having joined an association." (Government brief in *Inland Steel Co.* case, p. 35.) Later in the same brief, the Government said that only statutes "which impose prior restraints upon speech, press or assembly, or which make speech, or the distribution of literature, or attendance at a meeting, or membership in an association an offense" must meet the tests applicable to statutes affecting First Amendment rights (*idem.*, p. 36).

In reciting these alleged limitations upon the operation of the First Amendment, the Government has purported to set forth a general principle of law against which all claimed violations of the Amendment must be measured. In effect, the Government says, "Thus far the Constitution gives protection, and no further." No authority is cited for any such proposition, and our research has been unable to unearth any. Indeed, the Government has done no more than to list some of the instances in which the protection of the Constitution was sought and secured, and has then made the broad assumption that its list sets forth the extreme limits of constitutional protection. The difference between the formulation in the NMU brief and the formulation in the *Inland Steel Co.* brief is evidently accounted for by the fact that in the interim some additional decisions of the Court were called to the Government's attention, and, therefore, the list had to be expanded.

While it is true that the legislation at hand is invalid even under either of the Government's definitions, by virtue of the fact that the statute does punish plaintiffs by imposing disabilities and sanctions upon them for their exercise of First Amendment freedoms, we will not urge that upon this Court. We are not disposed to measure this legislation or, indeed, any other legislation involving the freedoms of religion, speech, press or assembly by so artificial and inaccurate a test. For it would be difficult to fit into that definition some of the leading cases decided by this Court in the last decade, and the protection of the

Amendment could be easily destroyed by an executive or a legislature which was ingenious enough to find new and devious techniques to restrict those freedoms.<sup>219</sup>

Does the Government urge that the decision in *West Virginia v. Barnette*, 319 U. S. 624, should be reversed? There, this Court applied the First Amendment's protection by striking down legislation which required children to affirm a belief and perform a rite or gesture which ran contrary to their religious scruples. Children who refused to do so were deprived of the right or "privilege" of attending the public schools, although private schools were available to them. Here, the statute did not impose "a prior restraint upon speech, press, or assembly." It did not restrict "the occasion for permissible exercise of these rights." It did not grant "facilities for the dissemination of certain views, or for the gathering of certain associations, which were denied to others." It did not punish "individuals for having joined an association." It fits within none of the categories listed by the Government. Nevertheless, this Court held that such legislation did abridge the First Amendment freedoms in that it imposed sanctions on belief.

Again, in *Hannegan v. Esquire*, 327 U. S. 146, this Court made clear that the First Amendment prohibitions would not tolerate a denial of the use of the second class mails to a periodical whose articles or views did not meet certain esthetic or other prescribed standards. There, it should be noted, there was no prior restriction as to what the

<sup>219</sup> "I cannot consider the Bill of Rights to be an outworn 18th Century 'strait jacket' \* \* \*. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new devices and practices which might thwart those purposes." (Black, J., dissenting in *Adamson v. California*, 332 U. S. 46, at p. 89.)

periodical might say. Nor was there any punishment in the nature of criminal penalties imposed. The periodical was not even deprived of the use of the mails. It might still use first or third class mail. It was merely deprived of the "benefit" of using the second class mails, a government "privilege" created by Congress. Nevertheless, this Court, relying on the dissent by Mr. Justice Brandeis in *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, pointed out that denial of the second class mails based on political or economic views would effect an abridgement of the constitutional rights of free press. Surely, free speech and association must receive that same broad protection. Obviously, the principle cannot be limited to use of the mails; any statute which denies the use of any government facility vital to one's existence, must likewise fall if such use is conditioned upon restrictions on speech or association. *National Broadcasting Co. v. United States*, 319 U. S. 190, 226; *Danskin v. San Diego*, 28 Cal. (2d) 536.<sup>22</sup>

<sup>22</sup> Regulation of government facilities so as to restrict the exercise of First Amendment rights has in the past been the subject not only of judicial decision, but of Congressional debate as well. This Court, in an extensive footnote to its decision in *Hannegan v. Esquire*, *supra*, in discussing the power of Congress to regulate the contents of matter passing through the mail said:

"But that power has been zealously watched and strictly confined. See, for example, S. Rep. 118, 24 Cong., 1st Sess., reporting adversely on the recommendation of President Jackson that a law be passed prohibiting the use of the mails for the transmission of publications intended to instigate the slaves to insurrection. It was said, p. 3:

"But to understand more fully the extent of the control which the right of prohibiting circulation through the mail would give to the Government over the press, it must be borne in mind, that the power of Congress over the Post Office and the mail is an exclusive power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable water to be a post road; and that, by the act of 1825, it is provided 'that no stage, or other vehicle which regularly performs trips on a post road, or on a road parallel to it, shall carry letters'. The same provision extends to packets, boats, or other vessels, on navigable



It would profit us nothing to further enumerate the various cases where the Amendment offers protection; or to define the limits of this protection, for this Court has never attempted to do so. The best statement of the extent of the protection can be found in the First Amendment itself. "Congress shall make no law . . . abridging the freedom of speech or of the press, or the right of the people peaceably to assemble . . ." <sup>23</sup> As stated by this Court in *Bridges v. California*, 314 U. S. 252, 265, ". . . the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." Judge Cooley, too, emphasized the broad scope of the First Amendment: "The evils to be prevented were not the censorship of the press merely, but any action of the Government by means of which it

waters. Like provision may be extended to newspapers and pamphlets; which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. It would, in fact, in some respects, more effectually control the freedom of the press than any sedition law, however severe its penalties. The mandate of the Government alone would be sufficient to close the door against circulation through the mail, and thus, at its sole will and pleasure, might intercept all communications between the press and the people . . ."

<sup>23</sup> The Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948, was obviously greatly influenced by our own Constitution. Thus Article 19 of the Declaration reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Article 20 reads: "1. Everyone has the right to freedom of peaceable assembly and association. 2. No one may be compelled to belong to an association" (New York Herald-Tribune, Dec. 11, 1948).



might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." (Cooley, *Constitutional Limitations*, 8th ed. p. 886.) Cf. *Near v. Minnesota*, 283 U. S. 697; *Grosjean v. American Press Company*, 297 U. S. 233.

This broad concept of the First Amendment is corroborated by a consideration of its history. Jefferson had sworn eternal hostility to *all forms* of tyranny over the minds of men,<sup>24</sup> not merely to those forms which might fall within the Government's limited definition. Other contemporary sources likewise disavowed any such limits upon the First Amendment.

The first test met by the First Amendment arose out of the Alien and Sedition Laws of 1798 and the debate both in Congress and in the public press indicated clearly the point of view of the progressives of that era. The remarks of Albert Gallatin, Jeffersonian leader in the House of Representatives, during the debate on the Alien and Sedition Laws, are illustrative. His comments in the House on July 10, 1798 are reported as follows:

"It appeared to him that it was an insulting evasion of the Constitution for gentlemen to say, 'We claim no power to abridge the liberty of the press; *that*, you shall enjoy unrestrained. You may write and publish what you please, but if you publish anything against us, we will punish you for it. So long as we do not prevent, but only punish your writings, it is no abridgment of your liberty of writing and printing.' Congress were by that amendment prohibited from passing any law abridging, &c. They were, therefore, prohibited from adding any restraint, either by previous restrictions, or by subsequent punishments, or by alteration of the proper jurisdiction, or the mode of trial, which did not exist before; in short, they were under an obligation of leaving that subject where they found it—of passing no law, either directly or indirectly, affecting that liberty." (*Annals of Congress*, 5 Congress, 1797-99; Emphasis in original.)

<sup>24</sup> Letter, Jefferson to Benjamin Rush, Sept. 23, 1800.

Another associate of Jefferson, George Nicholas, stated, in discussing the Alien and Sedition Laws:

"What has been said must prove that the liberty of the press ought to be left where the Constitution has placed it, without any power in Congress to abridge it; that if they can abridge it, they will destroy it; and that whenever that falls, all our liberties must fall with it. I cannot close this part of the subject better than by copying what was said respecting it by our late envoys: their expressions on this occasion are so just and forcible as to give real cause to lament that their abilities *are not oftener exerted* in illustrating and enforcing republican principles. They say 'the genius of the Constitution and the opinions of the people of the United States cannot be overruled by those who administer the government. Among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the government contemplates with *awful reverence*, and would approach only with the most *cautious circumspection*, there is none of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated to licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied: perhaps it is a shoot which cannot be stripped from the stalk *without wounding* vitally the plant from which it is torn. \* \* \*'"<sup>25</sup> (Emphasis in original.)

Even Federalists took up the cudgels against the Alien and Sedition Laws. General John Armstrong, a leader of the Federalist Party in Pennsylvania, protested these laws:

"To accomplish these [the objects set forth in the preamble to the Constitution], it became necessary to

<sup>25</sup> Letter from George Nicholas of Kentucky to his friend in Virginia (Lexington, Kentucky, Bradford Ed., 1798). Convenient text may be found in Bernard Smith, *Democratic Spirit* (1946), page 161.

enjoy certain duties, and to prohibit certain acts. Among these *prohibited acts* is the exercise of that very power we complain of, '*Congress shall make no law abridging the freedom of speech or of the press.*' A prohibition more express can scarcely be devised; and yet, extraordinary as it may appear, there is a portion of the national legislature who have contended that the law in question does not infringe this prohibition. The argument most relied upon in defence of their construction, may be thus concisely stated: 'The constitution indeed prohibits the passing of any law which shall abridge the freedom of speech and of the press. But the law in question does not abridge the *freedom* of either, it but prevents their *licentiousness*.' The fact however is, that this defence turns, not on a logical distinction, not on a clear and well marked difference, but on a mere quibble. It supposes that liberty and licentiousness are two things totally different; whereas they are the same thing under different modifications and degrees. In like manner, fanaticism does not cease to be religion, though it may adhere to forms and profess tenets, which the major part of mankind think ridiculous and extravagant.' (Emphasis in original.) <sup>26</sup>

<sup>26</sup> Armstrong, John; To the Senate and Representatives of the United States (1798). Numerous other authorities could be quoted to the same effect. Thus, Madison inveighed against indirect infringements upon free speech, saying: "It would seem a mockery to say, that no laws should be passed, preventing publications from being made, but that such might be passed, for punishing them in case they should be made \* \* \*. This security of the freedom of the press requires, that it be exempt, not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be factual, must be an exemption, not only from the previous inspection of licenses, but from the subsequent penalty of laws." (Report on Virginia Resolutions, 1799. 4 Elliot Debates, 1836, pp. 572 &c.)

George Hay, a prominent Jeffersonian lawyer, expressed most eloquently the liberal thought of his time in an essay entitled "Liberty of The Press," published in 1799. That document, which is included in the Freedom Train collection of American historical material now on exhibition throughout the country, is too long to set forth in full herein. Extensive excerpts are contained in an Appendix. It will be noted that Hay felt that freedom as the word is used in the First Amendment is the power, belonging to man "uncontrolled by law, of doing what he pleases, provided he does no injury to any other individual."

Thus we see that the Government's contention, that the First Amendment offers protection only in the limited circumstances defined by it, is untenable. That contention is without authority in the history of the Amendment or the decisions of this Court. On the contrary the only conclusion which both history and the cases permit is that this Amendment must receive the broadest interpretation possible within an orderly society. Clearly, therefore, the legislation at hand, which imposes disabilities and serious sanctions upon the exercise of the rights of free speech, press and assembly, must fall within the broad coverage of the First Amendment.

**D. The statute is not a general regulatory one, but is aimed specifically at members of the Communist Party and others holding unorthodox beliefs.**

The statute in question is not a general regulatory one, which incident to its operation and due to some peculiarity in an individual's religious or political belief or practice, adversely affects him in the exercise of that belief or practice. Rather it is a statute which is directly aimed against the exercise of First Amendment freedoms. Here, indeed, Congress has aimed against a particular political belief and its expression. The statute is thinly disguised in the form of a regulatory statute to accomplish a purpose which could not be accomplished by direct legislation.

Even a cursory examination of the legislative history of Section 9(h) makes clear that its aim was to drive from the trade union movement persons holding certain proscribed political beliefs.

H. R. 3020, the predecessor of the Act, introduced in the House of Representatives by Representative Hartley, Chairman of the House Committee on Education and Labor, on April 10, 1947, provided in Section 9(f)(6):

"(6) No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of

the officers of the organization designated on the ballot taken under subsection (d), is a member of the Communist Party or by reason of active and consistent promotion or support of the policies, teachings, and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such party, or believes in, or is a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

Debate in the House on this proposal was extensive and the purpose of the legislation was made apparent. For example, Congressman Kersten, one of the majority members of the House Committee and one of the principal proponents of the bill said, on April 16, 1947:

"One high-ranking officer of the United Electrical Workers in testifying before our committee brazenly stated to the committee that his was the most democratic union in the country because they accepted all shades of political belief. He openly stated that they accepted Communists on the same basis as people holding any legitimate different political belief. . . .

" . . . We have got to keep communism out of the American labor unions. This bill does that." (93 Cong. Rec. 3577, April 16, 1947.) <sup>27</sup>

On April 17, 1947 the House had under consideration a proposal to amend Section 9(f)(6) to apply to persons who are or ever have been members of the Communist Party. Congressman Hartley, Chairman of the House Committee, speaking in opposition to that motion, said:

"Mr. Chairman, it is with very great reluctance that I oppose the amendment which has just been offered. I understand thoroughly the purpose of the amendment, and I want just as much as the gentleman who offered it to drive Communists out of our labor organizations, but I do not want to deprive one who has seen the light

<sup>27</sup> All references to the Congressional Record are to the daily unbound edition.



and who has made an honest reform of the right to be a member of a labor organization." (93 Cong. Rec. 3705.)

On the same day, Congressman Rankin, another supporter of the bill, said:

"While we are challenging the spread of communism abroad, we should drive this vicious influence from American soil by forcing every Communist off the Federal pay roll, out of our educational institutions, off the radio, out of labor unions, and from every other position of trust or confidence which they can use to spread their poisonous propaganda." (93 Cong. Rec. 3708.)

No equivalent provision is found in the companion bill, S. 1126, introduced into the Senate on April 17, 1947. However, the House provision was incorporated into the Senate bill on May 9, 1947, through an amendment sponsored by Senator McClellan. In support of his bill, Senator McClellan said:

" . . . I believe that the great majority of laboring men and women of this country, if they could be here tonight and express themselves, would want the aid of the Congress in helping them to rid their organizations of Communistic influence, an influence which often they are unable to cope with or fight against effectively under the laws as they now are." (93 Cong. Rec. 5036.)

Section 9(h) took its present form in conference. When the conference report was reported out, Congressman Case of South Dakota said:

"There is a provision to protect labor organizations from having officers who are members of the Communist Party. It relieves the National Labor Relations Board from investigating matters raised by labor organizations unless the organization has on file an affidavit that its officers are not members of the Communist Party and have not been within the preceding 12 months. Surely the rank and file of sturdy Amer-

ican workers will welcome that protection and the President will hardly deny it to them by vetoing the bill because that is offered." (93 Cong. Rec. 6438, June 3, 1947.)

On June 4, 1947, Congressman Engel, in summarizing the conference report, said:

"Sixth. The provision to keep communists out of leadership of unions, which was merely a catch-all club in the Hartley bill, appears in the conference bill to have been made workable." (93 Cong. Rec. A2808.)

On June 5, 1947, in presenting the conference report to the Senate, Senator Taft said:

"\* \* \* There is nothing new. We changed the provision regarding Communist officers. The Senate adopted an amendment which provided that no union could be certified if any of its officers were Communists. That seemed to us impracticable. With the agreement of all the conferees we provided that the union must file an affidavit that none of its officers are Communists, or whatever the language may be. Otherwise, the way it was passed by the Senate, the whole certification might be tied up for months while determination was made as to whether a man was a Communist. Today it is provided that officers shall file statements to the effect that they are not Communists. If a man who files such a statement tells an untruth he is subject to the same statute under which Marzani was convicted last week. That seemed a fair modification to make, although it was not in the House bill. But there is no provision as to that subject that was not in one bill or the other." (93 Cong. Rec. 6604.)

In the debate over the President's veto, the purpose of the legislation was similarly clearly expressed. Thus, in the House, Congressman Robison said:

"\* \* \* The union cannot have so-called subversive union officers. It is found that Communists and other subversive groups have wormed their way into Government offices, the churches, labor unions, and other

American organizations. This would mean the Congress is trying to aid the unions in ridding themselves of Communists." (93 Cong. Rec. 7507.)

Similarly, in the Senate, Senator Ball, one of the principal proponents of the law, said, on June 21, 1947, in commenting on the President's veto:

"It is astonishing to find the President objecting to the section which attempts to prevent Communists from being officers of labor unions." (93 Cong. Rec. A3232.)

After the passage of the bill, the National Labor Relations Board recognized that the purpose of the law was to drive Communists from positions of leadership in the trade union movement quite regardless of what the membership of those unions may have felt. This purpose has been frequently commented on by the Board. For example, in its decision in *Matter of Northern Virginia Broadcasters, Inc.*, 75 NLRB No. 2, the Board said:

"The assumption is that if the facts are made known through this filing procedure, union members . . . will soon remove Communists from leadership rather than allow themselves to be precluded from enjoying the benefits of the Act."

Regulatory statutes, designed for a proper purpose, which incidentally come into conflict with the peculiar political or religious beliefs or practices of a particular party or sect have on occasions been held valid. For this Court has said " . . . we do not intimate or suggest . . . that any conduct can be made a religious rite and by the zeal of the practitioner swept into the First Amendment." (*Murdock v. Pennsylvania*, 319 U. S. 105, 109.) *In re Summers*, 325 U. S. 561, and *Hamilton v. Board of Regents*, 293 U. S. 245, strongly relied upon by the Government here, come within this category. Cf. *Ballard v. United States*, 322 U. S. 78. Even in such cases the Court has often been sharply divided.

But we know of no case, and none has thus far been cited to us, in which a statute directed against a First Amendment freedom has been held to be constitutional, regardless of its form, save in the presence of "clear and present danger" which is concededly absent in this case. *A fortiori*, a statute directed against a particular political belief must fall.

Illustrative of this principle is the decision in *Grosjean v. American Press Co.*, 297 U. S. 233. The State argued in that case that the statute imposed a tax on the business of "selling or making any charge for advertising or for advertisements" and also that it was not essential to liberty of speech and press that profit be derived from the exercise of those rights. The Court in striking down the legislation stated at page 250:

"The tax here involved is not bad because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In *Minersville v. Gobitis*, 310 U. S. 586, this Court sustained legislation general in scope (unlike that in the case at bar) which incidentally affected adversely a particular religious sect. Mr. Justice Frankfurter, speaking for the Court, said

"The religious liberty which the Constitution protects has never excluded legislation of a general scope *not directed against* doctrinal loyalties of particular sects. . . . Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law *not aimed at* the promotion or restriction of religious beliefs." (Emphasis supplied.)

The instant legislation could not be sustained even under the criteria set in that case which this Court has since, in *West Virginia v. Barnette*, 319 U. S. 624, held does not give sufficient protection. For this is legislation "directed against doctrinal loyalties" of a particular political party.

In *Lewis Publishing Co. v. Morgan*, 229 U. S. 288 (1913), cited below by the Government, a statute required periodicals, before using the second class mails, to file information with the Government disclosing the names of its stockholders, stating what portion of the periodical was devoted to advertisements and setting forth much other statistical information.

The Court in sustaining the validity of the legislation pointed out that there was an " . . . absence of anything justifying a surmise . . . that Congress was intentionally exercising power not delegated to it, and consciously violating an express prohibition of the Constitution, and for that reason clothed its exertion of power in the disguise of postal legislation."

The principle that the Court will look to the purpose of the legislation and will not permit an improper purpose to be masked in a general regulatory statute is not unique to cases involving the First Amendment; it has been applied to legislation effecting deprivation of rights under the Fifth and Fourteenth Amendments as well.

In *Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583, the Court acknowledged that a state might properly regulate its highways, but pointed out that where the statute was aimed against certain carriers, then, of course, it could not be considered a general regulatory statute at all, but simply a statute which sought by indirection to secure what it could not by direct methods. The Court invalidated the statute, saying that if such legislation were to be sustained, we might thus be stripped of our constitutional guaranties. The Court said, at page 591:

"It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public high-



ways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions."

See also *McFarland v. American Sugar Refining Co.*, 241 U. S. 79.

The Government urges that this Court has in the past sustained legislation enacted by Congress under its delegated powers, the effect of which was to induce voluntary action which Congress could not, because of the Tenth Amendment, compel directly, and cites in support thereof *Steward Machine Co. v. Davis*, 301 U. S. 548, *Alabama Power Co. v. Ickes*, 302 U. S. 464, *U. S. v. Bekins*, 304 U. S. 27, and *Oklahoma v. Civil Service Commission*, 330 U. S. 127. None of these cases are apposite to the statute at hand. For in the *Steward* case the Court specifically found that the purpose of the legislation was not an unconstitutional or improper one because the Tenth Amendment did not prohibit the national government and a state government from entering into a pact for the lawful purpose of sharing the burden of unemployment relief; the Court further specifically found that the State there was not coerced or unduly influenced to yield any of its rights by the threat of sanctions. The Court there indicated that had such coercion been applied, a contrary decision would have resulted. In the statute at bar, on the other hand, the purpose was improperly directed against rights guaranteed by the First Amendment, and failure to yield those rights results in the imposition of serious sanctions. The *Alabama Power*, *Bekins* and *Oklahoma* cases are similarly distinguishable. In none of them was the purpose of Congress to cause the surrender of rights guaranteed by the Constitution, and in none of them were sanctions applied for failure to yield those rights.

The basic failure of the Government's argument here is that it has mistaken form for substance. In judging the

validity of any statute "the Court has regard to substance and not to mere matters of form \* \* \* in accordance with familiar principles the statute must be tested by its operation and effect." *Near v. Minnesota*, 283 U. S. 697. See also *Oyama v. California*, 332 U. S. 633, 636. It is because of this fundamental, although not infrequent, error that the Government has cited cases such as those distinguished above. They bear little enough resemblance to the case at bar, even as a matter of form; they bear not the slightest resemblance as a matter of substance.

The facts presented to this Court in *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, are more in point. There, an administrative regulation was aimed against the expression of certain ideas advanced by a particular newspaper. It effected the suppression of that idea by denying the newspaper the use of the second class mails. There, as here, the Government urged that it merely was regulating the mails in the exercise of its postal police power and therefore the regulation did not effect an abridgment of First Amendment freedoms. The Government pointed out that no direct restrictions were imposed and that the newspaper might still avail itself of the first and third class mails. These arguments were rejected in the dissenting opinion of Mr. Justice Brandeis which was quoted with approval by this Court in *Hannegan v. Esquire*, 327 U. S. 146. Said Mr. Justice Brandeis at page 430:

"Congress may not, through its postal police power, put limitations upon the freedom of the press which, if directly attempted, would be unconstitutional. \* \* \* It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied; because the first and third class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. 'The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name.' *Cummings v. Missouri*, 4 Wall, 277, 325, 18 L. ed. 356, 363."

The above quotation applies with equal force to the case at hand. For in both cases an attempt was made to eliminate views which were currently in disfavor and in both cases the most effective method was chosen by depriving the group with the proscribed view from availing itself of a government facility vital to its existence. In the *Burleson* case an attempt at suppression was disguised in the form of a statute regulating government mails. In the case at hand, the suppression takes the form of a regulation of the National Labor Relations Board. In each case it was urged by the supporters of the regulation that First Amendment rights were not directly restricted nor the subject of the legislation. In the *Burleson* dissent this view was rejected, as it must be in the case at bar. In substance, both cases dealt with First Amendment rights and it is the substance of the statute as well as its purpose and effect which this Court will consider in determining the validity of a statute.

As a matter of fact, this Court has held in no uncertain terms that even a statute which is regulatory or a legitimate attempt to exercise police power (unlike the statute at hand) must be held invalid if inherent in its operation there is a deprivation of First Amendment rights. Such regulations were involved and stricken in the cases of *Schneider v. New Jersey*, 308 U. S. 147; *Murdock v. Pennsylvania*, 319 U. S. 105; *Hague v. C.I.O.*, 307 U. S. 496; *Jones v. City of Opelika*, 316 U. S. 584, 319 U. S. 103; *Thornhill v. Alabama*, 310 U. S. 88; *Cantwell v. Connecticut*, 310 U. S. 296; *Lovell v. Griffin*, 303 U. S. 444; *Martin v. Struthers*, 319 U. S. 141; *Saia v. New York*, 334 U. S. 558, and many others.

The Government here urges that this statute is a regulatory one and therefore may be sustained if there is a rational basis for the legislation, regardless of the discrimination or the denial of rights affected. In each of the cases above cited such, indeed, was the contention made by the proponents of the legislation. In so arguing, there-

fore, the Government is following in the footsteps of scores of unsuccessful litigants who have without avail urged that the particular statute then before the Court had a "reasonable basis" or that it was a "reasonable exercise of police power" or that it constituted a "proper regulation by municipal authorities of their streets and public places." But in each of these cases the contention was stricken because a deprivation of First Amendment rights was inherent in the regulation. In *Thomas v. Collins*, 323 U. S. 516, where a similar contention was made, the Court pointed out that where "the indispensable democratic freedoms secured by the First Amendment" are involved, "dubious intrusions will not be permitted." The Court made it clear that in judging such legislation "it is the character of the right, not of the limitation, which determines what standards govern the choice." Thus the Court found that: "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice," where any attempt is made to restrict First Amendment liberties.

It is for these reasons that the cases cited by the Government, such as *Dent v. West Virginia*, 129 U. S. 114; *Hawker v. New York*, 170 U. S. 189; *Clark v. Deckebach*, 274 U. S. 392; *Kotch v. Pilot Commissioners*, 330 U. S. 552; and *Hirabayashi v. U. S.*, 320 U. S. 81,<sup>28</sup> are in-

<sup>28</sup> The Government relies to a considerable extent on the *Hirabayashi* case in support of the proposition that even such a "neutral fact" as race may on occasion be a "rational basis" for legislation. Aside from the fact that the *Hirabayashi* case did not involve First Amendment freedoms, we must note that the regulation was a wartime measure, and it was the imminent threat to our very national existence which justified the very extreme legislation there upheld. The decision in that case makes it perfectly clear that such legislation would not be countenanced in time of peace, and as Mr. Justice Murphy pointed out, even in time of war the case brought us "to the very brink of constitutional power". 320 U. S. 81, 111. Any effort to extend that case beyond the exigencies of a war situation inevitably brings us well over that brink. See *Ex parte Endo*, 323 U. S. 283, and dissenting opinions of Justices Murphy and Jackson in *Korematsu v. U. S.*, 323 U. S. 214.

apposite. In none of these cases was there any issue of a denial of the First Amendment rights of belief, speech, press, association or religion. Rather, those cases concerned the other rights and freedoms which fall within the scope of the due process clause of the Fifth and Fourteenth Amendments only. This Court has held that the constitutional due process requirement for a deprivation of such rights is met by legislation which bears a reasonable relation to the valid objects of the regulation.

The First Amendment, on the other hand, provides that there shall be no abridgement of the freedoms therein defined and, accordingly, the courts have held that a rational basis is insufficient to support a regulation which affects or abridges those rights. The legislation at hand, dealing as it does with belief, speech and association, falls within the latter classification, and under the cases cited, must be held repugnant to the dictates of the First Amendment.

- E. Congress may not make the use of a Government facility dependent upon the surrender of any constitutional right. 9(h), however, conditions the use of the National Labor Relations Board upon the surrender of First Amendment rights.**

It was further argued in the Court below that the legislation at hand concerns merely the regulation of a Government "benefit" or "privilege" which might be granted or denied upon any basis, including religious or political beliefs, expressions, or affiliations, provided there is some rational basis therefor.

This contention is an inaccurate one and finds no support in the cases. It should be noted, first, that the statute does not merely grant a benefit or privilege, which a union is free to accept or reject. As discussed above, it concerns a Government facility which may be so used by others under the statute as to deprive plaintiffs of fundamental rights. Second, the object of the legislation is not mere regulation of a facility, but the elimination of a belief.



However, even disregarding these elements, the Government's contention is without merit. For Congress may not condition the use of a Government facility upon surrender of First Amendment freedoms.

The Government, in urging a contrary principle, falls into the same error here as it does in its contention concerning general regulatory statutes. For, just as this Court has held that the rational basis argument is unavailing to sustain the validity of regulatory statutes which affect First Amendment rights, so too it has held that a rational basis is insufficient to support legislation which conditions use of a government facility upon surrender of First Amendment freedoms. *West Virginia v. Barnette*, 319 U. S. 624. See also *Danski v. San Diego*, 28 Cal. (2d) 536. Indeed, there would be little point in establishing the very strict requirements to protect those freedoms if they might be so easily circumvented.

It is true that use of a government facility, or the grant of a benefit or privilege, may be conditioned upon the deprivation of certain of one's property rights, or, indeed, upon certain restrictions on one's liberty, provided, of course, that such rights and freedoms are not First Amendment rights, but the other rights which fall within the scope of the due process clause. For, as indicated above, the due process requirement there is satisfied upon the showing of a rational basis for the legislation. The rule is a simple one and has been affirmed and reaffirmed by this Court. Use of a government facility or the granting of a benefit or privilege may not be conditioned upon the surrender or deprivation of constitutional rights. If the condition affects property rights or liberties other than the basic ones within the First Amendment, then the due process test of "rational basis" must apply; if the condition affects First Amendment rights, a rational basis is clearly insufficient.

Were it otherwise, governments in an effort to curb unpopular minority beliefs, might deny to persons who ex-

press such beliefs, the use of the schools, the roads, the railroads, the mails, and an infinite number of other government facilities or "privileges" which vitally affect the very existence of the average citizen today, just as the use of the National Labor Relations Board may vitally affect the life of a trade union and its members today. Here again we must be careful not to confuse substance and form.

We had thought that there was nothing left today to the argument that government facilities constitute a "privilege" (as distinguished from a public right), which might be granted or withheld by a government at will. Such, indeed, was the opinion of the majority of the Court in *Milwaukee v. Burleson*, 255 U. S. 407, but it may safely be said that the dissenting opinion of Mr. Justice Brandeis at page 433 more correctly states the law as this Court sees it today:

"The contention that, because the rates are non-compensatory, use of the second-class mail is not a right, but a privilege, which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation."

Again, more recently, the Supreme Court had an opportunity to give consideration to this problem in *Hannegan v. Esquire*, 327 U. S. 146. Mr. Justice Douglas, speaking for the Court, stated, at page 156, as follows:

"But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *United States ex rel Milwaukee S. D. Pub. Co. v. Burleson*, 255 U. S. 407 \* \* \*. Under that view the second class rate could be granted on condition that certain economic or political ideas not be disseminated."

The extreme possibility which Mr. Justice Douglas foresaw and warned against is precisely what the legislation at hand effects. Access to the National Labor Relations Board is, by virtue of this statute, granted on condition that one shall not maintain certain economic or political ideas.

*West Virginia v. Barnette*, *supra*, concerned an ordinance which would deny the "privilege" of attending the public schools to one who could not attest to certain beliefs. The Court there pointed out that the "privilege" of attending the public schools might not be denied to one because of his religious beliefs, such right being protected by the First Amendment.

*Frost v. Railroad Commission*, 271 U. S. 583, again demonstrates that one's constitutional rights may not be abridged by the indirect method of purporting to regulate a government facility or "privilege." There property rights under the Fourteenth Amendment were involved. The Court vehemently rejected the argument that by creating what was termed a "privilege", the State might require the surrender of constitutional rights as a condition to the use of the same. There, the State had urged that it had the power to grant to its citizens the privilege of using its public highways on such conditions as it saw fit to impose, a carrier being free to accept or reject. The Court there found against such a contention, pointing out that the choice offered to the carrier was an illusory one. As the argument advanced by the state there was so similar to that advanced by the Government here and the comments of the Court so pertinent, we have taken the liberty of quoting therefrom, at page 593, at length:

"May it [the constitutionally prohibited act] stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having

regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

See also *Danskin v. San Diego*, 28 Cal. (2d) 536 (where it was claimed that use of schools for public meetings was a "privilege"); *Western Union v. Kansas*, 216 U. S. 1 (where it was claimed that the right of a foreign corporation to do business within a state was a "privilege"); *National Broadcasting Co. v. United States*, 319 U. S. 190, 226 (where it was claimed that the right to operate a broadcast station was a "privilege").

Nor does the case of *United Public Workers v. Mitchell*, 330 U. S. 75, hold otherwise. Examination of that case discloses that it concerned not the use of a public facility, but rather qualifications for government employment. The Government, in its brief there, pointed out that the legal

restrictions there involved were "not more severe than the conventional restraints which attaches to numerous public and private employments. The fact that it is embodied in a statute need occasion no surprise and gives rise to no problem; for the conditions of public employment are normally specified by law instead of by contract. As to government service, therefore, statutory provisions may fix terms which legislation could hardly impose upon private employees. That there are constitutional limits to such restrictions may be conceded; but the power of the Government as employer has broader scope than its regulatory authority." (Government brief in *Mitchell* case, p. 33). The Court accepted that argument of the Government. However, it made clear that Government employment could not be extended on condition of surrendering basic First Amendment rights. Said the Court:

"Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not enact a regulation providing that no Republican, Jew, or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work. None would deny such limitations of congressional power \* \* \*."

Yet that is precisely what the legislation here effects as a condition to the use of a government facility. In the *Mitchell* case, it should be noted, the Court goes further to point out that what was required as a qualification for employment was merely that employees not actively participate in political work for any political party. The statute did not seek to regulate belief or membership in political parties. Moreover, the Court was careful to secure to government employees their right of "expressions, public or private, on public affairs, personalities, and matters of public interest, not an objective of party activity."

It is clear, therefore, that First Amendment rights are here involved, and that the free exercise of those freedoms



are seriously curbed by the statute at hand. Therefore, the statute must be measured in terms of the tests which this Court has applied to legislation which restricts such First Amendment liberties. We turn, therefore, to a consideration of those tests.

**F. 9(h) cannot meet the strict requirements imposed upon legislation which affects First Amendment rights.**

"The power of a state to abridge freedom of speech and assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government." *Hernandez v. Lurry*, 301 U. S. 242, 258.

This limited exception to the broad protection of the First Amendment was first enunciated by this Court in *Schenck v. United States*, 249 U. S. 47, 52, where the Court said:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

See also *Stromberg v. California*, 283 U. S. 359; *West Virginia Bd. of Education v. Barnette*, 319 U. S. 624; *Thornhill v. Alabama*, 310 U. S. 88.

In *Bridges v. California*, 314 U. S. 252, this Court considered at some length the meaning of this language in the *Schenck* case. The Court pointed out that

" . . . the likelihood, however great that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial,' Brandeis, J. concurring in *Whitney v. California*, supra, 274 U. S. at page 374, 47 S. Ct. at page 647, 71 L. Ed. 1095; it must be 'serious,' *Id.*, 274 U. S. at page 376, 47 S. Ct. at page 648, 71 L. Ed. 1095. And even the expression of 'legislative preferences or beliefs' cannot transform minor mat-

ters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider v. State*, 308 U. S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155.

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

There is no such "clear and present danger" in the instant case as could justify the legislation. In fact, such legislation could not possibly, under any circumstances, meet the clear and present danger test applied by this Court. Belief could never constitute such a clear and present danger. It is difficult, if not impossible, to conceive how the expression of belief, or the joining of a political party, without more, could ever constitute such a danger.

This Court has never clearly defined the precise limits of the clear and present danger doctrine. A recent statement of the law may be found in the concurring opinion in *Musser v. Utah*, 333 U. S. 95, where Justice Rutledge (Justices Murphy and Douglas concurring), said:

"The Utah statute was construed to proscribe any agreement to advocate the practice of polygamy. Thus the line was drawn between discussion and advocacy.

"The Constitution requires that the statute be limited more narrowly. At the very least the line must be drawn between advocacy and incitement, and even the state's power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether vio-

lent or merely offensive to the mores, and the degree of probability that the substantive evil actually will result."

Twenty years ago Mr. Justice Brandeis had similarly expressed his view of the extent of the clear and present danger doctrine in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 376:

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by reaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."

There is no reason to attempt any complete definition of the limits of that doctrine in this case. In the first place, it is clear that in so far as the statute affects belief or its expression, it would fall by any definition. In the sec-

ond place, the Government here makes no claim that there is a clear and present danger. In fact, it specifically disavowed the presence of any such danger in argument before the Court below as the dissenting Justice noted. 79 Fed. Supp. 565. Evidently, the same concession was made in argument before the Court of Appeals in the *Inland* case, causing Judge Major to note: "The Board in substance concedes that the section cannot be justified by what the Supreme Court has characterized the 'clear and present danger' rule." 170 F. (2d) 247, 257. See also the dissent of Judge Prettyman in the *NMU* case, 78 Fed. Supp. 146, 177.

Similarly, there is no hint either in the statute itself or in the reports of the Congressional committees which considered the bill, that the legislature found any such danger. In fact, the record is barren even as to the nature of the substantive evil to which Congress addressed itself in passing this statute. The Government, faced with the necessity of finding such an evil, has conjured up one for the Court. To accomplish this, it has been compelled to rely not only on the legislative history of this statute, but on a wide variety of other documentary material ranging from Gitlow's book published in 1940, to newspaper stories published months after the statute was passed. Thus the most favorable case possible for the statute has been presented, through the use of alleged documentation, the bulk of which is of extremely questionable character, and most of which is not even shown to have been before Congress when the statute was passed. The sum total of this falls far short of a clear and present danger of any substantive evil.

Judge Prettyman, in his dissent in *NMU v. Herzog*, *supra*, at pages 181, 182, summarized the Government's contention as follows:

" \* \* \* It says that Congress has concluded that Communists in labor organizations might use the strike for political purposes and might use their power to stir up strife instead of promoting peace, and that

this conclusion is sufficient to support the interdiction. The 'might' in this part of its contention is intentional. The brief never makes any contention except that Communists 'might' do these things; it never asserts that the evidence before Congress shows that they *would*, or that they *probably* would. That this was the full extent of its position was made clear and emphatic by counsel upon the oral argument. Counsel for the Board said:

'There is, we believe, adequate evidence upon which Congress could conclude that part of the philosophy and program of the Communist Party is to regard labor unions as political rather than economic instrumentalities. We believe that Congress could further conclude and it did conclude that membership in the Communist Party or support of an organization dominated by the Communist Party gave reason to believe that an individual might—not necessarily must, but might—if he became an officer of a labor organization or was such an officer, be influenced by the doctrine of the organization of which he was a member and utilize or tend to lead his organization into paths of political action in the interest of the Communist Party rather than in the paths of economic action that Congress wanted to promote.'

"And again he said:

'The connections that are important are whether Congress could view the doctrine of the Communist Party with reference to labor organizations, their purposes and their uses, whether it could take cognizance of the view of the Communist Party in that field and whether it could say that we believe that some people who are members of the Communist Party may, by virtue of that fact—not must and not all—but that some may by virtue of that fact utilize their positions in labor organizations to turn them into political weapons to support the Communist Party doctrine, or causes, or programs, or policies, rather than to foster collective bargaining as a friendly method of adjustment of disputes, rather than utilization of their labor organizations as purely an economic weapon to raise the wages and



hours and working conditions of the laborers underneath. That, Your Honor, is the position we take here.'

"Thus, the question posed by the contention as actually made by the Government, is whether Congress may deny a Government facility to all members of a named organization because it finds that some such persons might—not all such persons but some, and not must but might—use the facilities for an undesirable end. \* \* \* " (Italics in original.)

At most, therefore, the Government makes the contention that *some* members of the Communist Party might be guilty of acts which *might* have a *tendency* to create an evil. That such a remote possibility could not justify this type of legislation was stressed in *Bridges v. California*, *supra*, where the Court said: " \* \* \* the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press." And again "In accordance with what we have said \* \* \* neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." (314 U. S., at 262 and 273.)

Not only must the evil which Congress seeks to prevent be imminent, but the legislation must be narrowly drawn against that evil if the law is to be upheld. " \* \* \* legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge v. Oregon*, 299 U. S. 353, 364. Here the abuse is not even defined, much less dealt with, and *only* the rights are curtailed. For Congress, in lieu of defining and prohibiting an abuse, has leveled a broad prohibition against members of a named political party together with a loosely defined class described as "affiliates" of that party and others holding proscribed beliefs. That an abuse or practice of which a political party may be guilty cannot be imputed to its members has been clearly established by this Court and will be more fully discussed in Point III of this brief. Moreover, the very

breadth of the language of the statute is such that it is difficult to ascertain precisely whom it encompasses and the statute is, for that reason, likewise, invalid, as will be discussed more fully in Point II.

Such sweeping interdiction of a broad class of people can hardly stand in the face of the Court's repeated warnings that "Ordinances that may operate to restrict the circulation or dissemination of ideas on religious or other subjects should be framed with fastidious care and precise language to avoid undue encroachment on these fundamental liberties." Dissenting opinion in *Jones v. City of Opelika*, 316 U. S. 584, 611, adopted as the majority opinion at 319 U. S. 103.

The Court has on occasion considered statutes which were so sweeping in their language as to penalize the peaceful exercise of the rights of free speech and assembly, merely because some of the persons exercising those rights might elsewhere have been guilty of activities which could have been prohibited, or because the assembly was held under the auspices of an organization, some of whose activities might be criminal. The Court has held such statutes invalid because they dealt with and penalized the exercise of the right rather than the elimination of the abuse. *Herndon v. Lowry*, 301 U. S. 242.

So, this Court has said:

" \* \* \* peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purposes; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public

peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *De Jonge v. Oregon*, 299 U. S. 353, 365.

Contrary to the warnings of this Court, the statute aims directly at the exercise of rights and penalizes them. It makes no attempt to eliminate an evil. It is indeed difficult to conceive of a statute more broadly drawn or which makes less effort to meet the constitutional requirements here considered.

**G. In statutes which affect the First Amendment, the usual presumption of constitutionality does not apply. On the contrary, there is a presumption of unconstitutionality.**

First Amendment rights occupy "a preferred position," and freedom of speech, press, assembly and religion are jealously guarded by this Court. *Murdock v. Pennsylvania*, 319 U. S. 105, 116; *Marsh v. Alabama*, 326 U. S. 501, 509; *Follett v. McCormick*, 321 U. S. 573, 575. When a statute is challenged as impinging on those rights, the Court will examine the legislation with the greatest care "to determine whether it is so drawn as not to impair the substance of those cherished freedoms in reaching its objective." *Jones v. Opelika*, dissenting opinion, 316 U. S. 584, 611, adopted as majority opinion at 319 U. S. 103.

The presumption of constitutionality, which normally operates in favor of a statute is balanced, and indeed reversed, by the preferred place given to these rights. *Thomas v. Collins*, 323 U. S. 516; *Thornhill v. California*, 310 U. S. 88; *Schneider v. New Jersey*, 308 U. S. 147.

As the concurring opinion in *U. S. v. C.I.O.*, 335 U. S. 106, 140, stated:

"As the Court has declared repeatedly, that [legislative] judgment does not bear the same weight and

is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency. The presumption rather is against the legislative intrusion into these domains. For, while not absolute, the enforced surrender of those rights must be justified by the existence and immediate imminency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions upon the very foundation of democratic institutions, grounded as those institutions are in the freedoms of religion, conscience, expression and assembly. Hence, doubtful intrusions cannot be allowed to stand consistently with the Amendment's command and purpose, nor therefore can the usual presumptions of constitutional validity, deriving from the weight of legislative opinion in other matters more largely within the legislative province and special competence, obtain."

Professor Robert E. Cushman of Cornell University, discussing civil liberties decisions by this Court in the ten-year span between 1937 and 1947, said:

" \* \* \* the four liberties protected by the First Amendment are so indispensable to the democratic process and to the preservation of the freedom of our people that they occupy a preferred place in our scheme of constitutional values. \* \* \* This priority was, of course, recognized in the action of the Court, beginning with the *Gitlow* case back in 1925. \* \* \* The Court, however, did not stop here, but moved on to the second principle, which is that freedom of speech, press, religion and assembly are so vitally important that the usual presumption of constitutionality will not attach to a statute which on its face appears to abridge any of them. On the contrary, such a statute will be presumed to be unconstitutional. \* \* \* The new doctrine, then, is that freedom of speech, press, religion and assembly are so uniquely important that legislative restrictions upon them will be presumed to be unconstitutional unless shown to be justified by a clear and present danger." (XLII American Political Science Review, pp. 37, 42.)

The basis for the presumption of the unconstitutionality of statutes affecting First Amendment freedoms has been enunciated as follows:

"The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences of free speech and free assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them." (Jackson, Robert H., *The Struggle for Judicial Supremacy* (1941), p. 285.)

## POINT II

### SECTION 9(h) IS SO VAGUE AND INDEFINITE AS TO RENDER IT UNCONSTITUTIONAL UNDER THE FIRST AND FIFTH AMENDMENTS.

The oath prescribed by the statute recites that the affiant "is not a member of the Communist Party or affiliated with such party, and that he does not believe in, or is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." There is no statutory definition provided for any of the terms contained in the oath. It is submitted that the words "affiliated with," "supports," and "unconstitutional methods" (as opposed to force) are so vague and indefinite as to conflict with both the First and Fifth Amendments to the Constitution.

A statute, the terms of which are so vague and indefinite "that men of common intelligence must guess as to its



meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U. S. 385, 391; *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233. This is particularly true where misconstruction of the terms of a statute may result in the imposition of criminal penalties. *Lanzetta v. New Jersey*, 306 U. S. 451. So, too, this Court has cautioned that legislation which seeks to curb any of the First Amendment freedoms must likewise be narrowly drawn and the conduct proscribed defined specifically "so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation. Blurred signposts to criminality will not suffice to create it." *United States v. C. I. O.*, 335 U. S. 106. This statute fails to meet these elementary tests. The affiant is placed in a position by the statute whereby he must take the required oath if he is to avoid the severe sanctions of the Act being applied against him and his union. The subject of the oath concerns his First Amendment freedoms, and for any misinterpretation of the terms of the oath, he is subject to criminal penalties. Indeed, this case falls squarely within the principle set forth in *Winters v. People of the State of New York*, 333 U. S. 507:

"The appellant contends that the subsection violates the right of free speech and press because it is vague and indefinite. It is settled that a statute so vague and indefinite, in the form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Stromberg v. People of State of California*, 283 U. S. 359, 369, 51 S. Ct. 532, 535, 75 L. ed. 4117, 73 A. L. R. 1484; *Hernon v. Lowry*, 301 U. S. 242, 258, 57 S. Ct. 732, 739, 81 L. ed. 1066. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment violates an accused's rights under procedural due process and freedom of speech or press."

It is submitted that under the standards adopted by this Court, at least three of the terms contained in the statute are so vague and indefinite as to violate the requirements of both the First and Fifth Amendments. And since the affiant must swear concerning all three terms, vagueness as to any one of them will be sufficient to invalidate the law.

**A. "Affiliated with."**

The Act contains no statutory definition of the term "affiliated with" nor does there appear any clear definition of the term in the Committee Reports or the Congressional debates on the floor of Congress. The debates indicate what Congress had in mind, but paradoxically the legislative intent here serves to increase the indefiniteness of the statute rather than assist the Court in ascribing any clear meaning to it. For it was obvious that Congress intended to bring within the scope of the statute a large group of persons holding a variety of beliefs whose only common characteristic was that in one respect or another their policy coincided with that of the Communist Party.

For example, House Report No. 245 on H. R. 3020 uses at one point the expression "Communist or subversive officers." In another passage that report refers to "unions whose officers are Communists or follow the party line." Still again it refers to "Communists and fellow travelers." And a few pages further, to "front organizations."

In the course of the debates various Congressmen similarly referred to a general broad group as within the coverage of this provision. Congressman Kersten referred to an officer who "is a member of the Communist Party or a party-liner," and later to "Communists and their fellow travelers." And once again to "party-line officers." (93 Cong. Rec. 3577, April 16, 1947.)

Congressman Lesinski, on June 19, 1947, in discussing the bill which had just been vetoed by the President, in discussing Section 9(h), referred to labor organizations

which have "Communist or subversive officers." (93 Cong. Rec. 7494.)

Debate in the Senate showed the use of similarly general terms. Senator Wiley urged the trade union movement to "cleanse its own house of Communists, subversive alien-minded saboteurs." (93 Cong. Rec. A. 1100, March 17, 1947.)

In view of the activity over the past few years of various Congressional Committees and the indiscriminate name-calling which has recently characterized not merely Congressional debate, but discussion in the public press and elsewhere, the fears of a trade union officer that he might be regarded as "affiliated with" the Communist Party because he agrees with some of the program of the Communist Party can hardly be regarded as unfounded.

Most C.I.O. unions and their officers have been active in the Political Action Committee of the Congress of Industrial Organizations. The Un-American Activities Committee of the House of Representatives, in various reports and public hearings, has described the Political Action Committee as being under the domination of an entrenched Communist leadership. A prudent trade union officer who had been a member of that committee or who had given it active support might well hesitate to sign such an affidavit, lest his membership or activity be deemed to constitute affiliation with the Communist Party. (Un-American Activities Committee, House Report No. 1311, 78th Congress, Second Session, March 28, 1944; Cong. Rec., March 9, 1944, page 2438; Public Hearing by the House Un-American Activities Committee, Vol. 17, October 5, 1944.)

The limited judicial discussion on the concept of affiliation likewise offers little help in determining the meaning of the words used here. The principal decision considering the meaning of the word "affiliation" is, of course, *Bridges v. Wixon*, 326 U. S. 135. However, the statute before the Court in that case contained a statutory definition

which the Court found necessary to an intelligent discussion of the meaning of the word. Said the Court:

"The legislative history throws little light on the meaning of 'affiliation' as used in the statute. It imports, however, less than membership but more than sympathy. By the terms of the statute it includes those who contribute money or anything of value to an organization which believes in, advises, advocates, or teaches the overthrow of our government by force or violence. That example throws light on the meaning of the term 'affiliation.'"

In that case the Court considered the meaning of the term at some length. As Judge Major pointed out in his dissent in the *Inland Steel* case, *supra*, "The court's discussion [in *Bridges v. Wixon*, *supra*] is convincing that its meaning would be quite beyond the reach of the ordinary citizen."

The decision in the *Bridges* case was the culmination of years of litigation over the proposed deportation of Bridges. James N. Landis, former Dean of Harvard Law School, had first considered the matter and had reached one definition of the term "affiliated with" (see *In the Matter of Harry R. Bridges, Findings and Conclusions of the Trial Examiner*, pp. 10, 11). After the amendment of the statute the matter was referred to Charles B. Sears, former Judge of the New York Court of Appeals. He reached a somewhat different definition of the meaning of the term. Judge Sears was reversed by the Board of Immigration Appeals. Attorney General Francis Biddle disagreed with the Board of Immigration Appeals and agreed with Judge Sears. This Court found that both Judge Sears and Attorney General Biddle had given the term "a looser and more expansive meaning than the statute permits" (326 U. S. 144).<sup>29</sup>

<sup>29</sup> Judge Chase, in *United States ex rel. Kettunen v. Reimer*, 79 F. (2d) 315, refused to give a comprehensive definition of "affiliation" as used in the deportation statute, saying: "Very likely that is as impossible as it is now unnecessary."

In view of this record of sharp disagreement between men of more than common intelligence, who clearly differed as to the application of the term in a case where they had the assistance of a statutory definition, we may well agree with Judge Major when he said, "The facts required to be stated in the affidavit [required by Section 9(h)] are of such an uncertain and indefinite nature as to afford little more than a fertile field for speculation and guess" (170 F. (2d) 247, 262).

### **B. "Supports."**

Much of what we have said above in connection with the term "affiliated with" is applicable to the word "supports." If anything, that term is even broader than and more general in its scope than "affiliated with." The term may include financial support and perhaps other methods of support as well. But here again the trade union official, faced with the necessity of signing an affidavit, must determine, perhaps at the peril of his liberty, how broad the statute is. Does it include support of clearly lawful objectives (such as public housing) of an organization which believes in unlawful overthrow of the Government? If a trade union official signs a petition circulated by such a proscribed organization in support of part of its program, is he thereby supporting the organization? If he attends meetings or engages in private conversation which show his agreement with some of the activities of the proscribed organization, does he thereby come within the statutory prohibition?

### **C. "Illegal or Unconstitutional Methods."**

The difficulties faced by a trade union leader in determining whether the proposals he advocates for reform of the United States Government are "illegal or unconstitutional" are substantial. For eminent lawyers have frequently differed on what is or is not unconstitutional.



and it has happened not infrequently that even members of this Court have differed among themselves on constitutional problems. "These are matters which perplex the Bench and the Bar, and the diversity of opinion among judges as to what is illegal and unconstitutional often marks the boundary line between majority and dissenting opinions" (Major, J., at 170 F. (2d) 262).

The Government has not in any of the cases heretofore argued in the lower courts made any serious argument that this statute is not vague. Instead it attempts to excuse the statute's vagueness by urging that since Section 35-A of the Criminal Code applies only to wilful violations, a trade union officer who signs the affidavit need not fear prosecution if he acts honestly. We can formulate no better answer to this proposition than that urged by Judge Major in his *Inland* dissent. He stated that the substance of the argument was:

" \* \* \* that an officer of a Union need not be too much concerned about the truthfulness of the affidavit which he makes because he can only be convicted under Sec. 35-A of the criminal code for 'knowingly and wilfully' making a false affidavit. In the Board's own words, 'Clearly, no affiant could successfully be prosecuted under this section for filing a false affidavit under Sec. 9 (h) unless it could be proved that he knowingly lied in making the averments contained in his affidavit.' This statement, so I think, could be made concerning every prosecution for perjury. The Board makes the further puerile suggestion that an affiant need not be afraid of a groundless prosecution because 'our law provides adequate modes of redress to victims of malicious prosecution.'

"To me, this argument is shocking and should be repudiated in no uncertain terms. Bluntly stated, it means that an officer of the Union who makes the affidavit need not be concerned with the sanctity of his oath because of the unlikelihood of conviction in case of a prosecution for perjury. He need not be afraid

because the only danger which he assumes is the hazard of a prosecution which when unsuccessful leaves him as the possessor of a damage suit against his accuser in an action for malicious prosecution. This argument is a persuasive indication that the section should be invalidated because of its vagueness and uncertainty" (170 F. (2d) at 263).

Still another answer can be made to the Board's contention that an honest trade union official has nothing to fear, since he can always try the issue of his wilfulness before a jury. If that argument were sound it would be applicable to every vague criminal statute, since in every case criminal intent is an element. But reliance upon a jury in cases such as this affords small comfort to a prospective affiant. The definition of Communism varies greatly, depending on who gives it. We might note just in passing that George Fitzhugh characterized the Abolitionists as Communists in the pre-Civil War period;<sup>30</sup> that Joseph Choate, in arguing *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, before this Court, stated that if the income tax law were held unconstitutional "Communism is on the march";<sup>31</sup> and that Judge Samuel Seabury, in arguing the constitutionality of the New York State Labor Relations Act before the New York Court of Appeals, stated that the law contained "the essential principle of that species of Communism upon which the present Russian dictatorship is founded."<sup>32</sup>

If a prominent writer of the 19th Century could come to the conclusion that opposition to Negro slavery was Communism; if an eminent jurist at the close of the century could come to the conclusion that the income tax law

<sup>30</sup> Fitzhugh, George: *Cannibals All!* (1857), pp. xvi; 154.

<sup>31</sup> Closing argument by Mr. Choate, on behalf of Complainants, in Support of the Contention that the Income Tax Law of 1894 is Unconstitutional, p. 6.

<sup>32</sup> Brief for appellants in *Metropolitan Life Ins. Co. v. N. Y. State Labor Relations Board*, 280 N. Y. 194, p. 44.

represented Communist ideas; and if one of the leaders of the New York Bar could come to the conclusion that the State Labor Relations Act was Communist in its conception, a trade union officer might well hesitate in putting before a relatively untrained jury the issue of whether his belief in equal rights for Negroes, higher taxes or collective bargaining, might not constitute "affiliation with" the Communist Party.

The admonition of General John Armstrong in the document already quoted at page 43, *supra*, is apt:

"The genius of this law pervades all its details, the crime is so defined, that we know not when we become guilty of it; for in the wide range of political opinion, how many things may be innocently said, how many even usefully suggested, which may be so construed as to incur these penalties! With a jury of partisans, warmed by zeal, and heated by contention, selected by an officer in the appointment of the President, and holding that appointment during the pleasure of the President, what opinion can be safe?"

### POINT III

#### **SECTION 9(h) IS ARBITRARY IN THAT IT ADOPTS THE TEST OF GUILT BY ASSOCIATION AND HAS NO RATIONAL BASIS.**

As the discussion in Point I, *supra*, demonstrated, a rational basis is insufficient to justify any invasion or abridgement of rights guaranteed under the First Amendment. And although it is clear that the case at hand is concerned primarily with the abridgement of those guaranteed rights, it likewise violates the due process clause of the Fifth Amendment in that it is arbitrary and has no rational basis. We shall at this time address ourselves to that aspect of its unconstitutionality.

It is a basic tenet of our law and of the constitutional rights guaranteed by the Fifth Amendment that, in enact-

ing legislation affecting a deprivation of liberty or property, the means adopted must be reasonably related to a legitimate end within the delegated powers of Congress. *Railroad Retirement Board v. Alton*, 295 U. S. 330; *McFarland v. American Sugar Refining Co.*, 241 U. S. 79.

Any analysis of the statute in question reveals that it fails utterly to meet this basic test.

We turn first to a consideration of to what legitimate end Congress was legislating, and what evil it sought to eliminate by effecting the restrictions and sanctions contained in and necessarily resultant from Section 9(h). A reading of Section 9(h) itself affords no clue and so we are obliged to examine the balance of the statute and the committee reports of both House and Senate, as well as arguments and comments made on the floor of Congress which might show the considerations that influenced the legislation. *Carolene Products Co. v. U. S.*, 323 U. S. 18.

We turn then to the statute in question which was enacted supposedly under the delegated power of Congress to regulate commerce. The purpose of the original National Labor Relations Act as specifically set forth in Section 1 thereof, was to promote the full flow of commerce and to set forth the rights of employers, employees and labor organizations with the view to the elimination of strikes, industrial strife and unrest which have the necessary effect of burdening or obstructing commerce. Toward this end the statute proclaimed that the policy of the United States shall be achieved by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of employment or other mutual aid or protection."

The National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, reiterated that purpose and added thereto the following finding:

"Experience has further demonstrated that certain practices by some labor organizations, their officers and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the full flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights guaranteed herein."

We shall for the moment assume, because it is the Government's contention here, that Section 9(h) was intended to eliminate such "practices." However, Section 9(h) on its face neither defines, describes or prohibits any such practices, nor does it set forth any punishment for the same. Nor does any section of the Act make clear just what practice or abuse Section 9(h) was intended to eliminate. In lieu thereof, Section 9(h) has condemned a named political party and punished those who are members of or are "affiliated with" that party, or who hold other forbidden beliefs. But obviously a currently unpopular political party or those maintaining currently unpopular political beliefs cannot themselves properly constitute an evil which Congress has a right to correct or prevent in the exercise of its delegated power under the commerce clause. It is only wrongful acts or practices which could constitute an evil, and it is only to eliminate or prohibit those acts or practices that Congress can legislate, provided, of course, that the means used could reasonably achieve the end, and provided, also, that the end is one which it is within the delegated powers of Congress to secure.

We turn then to the committee reports, and the debates on the floor of Congress. The conference committee in reporting the bill as it was finally enacted gave no hint as to the evil which Congress sought to eliminate by Section 9(h). Earlier, the Senate Committee on Education and Labor, in reporting the bill to the upper chamber, had been



silent on the entire subject. The House Committee, in reporting H. R. 3020, likewise nowhere makes clear what practice this section sought to curb, merely commenting that "Communists use their influence in unions not to benefit workers, but to promote dissension and turmoil." (House Report 245 on H. R. 3020, 80th Congress, First Session.)

Debate on the floor of both Houses likewise did not make clear the abuse which the legislation was to correct; it consisted for the most part of invective levelled against Communists showing intense dislike by the legislators for that group, but indicated no specific activities which Congress sought to curb.

There is thus no finding, as the Government would have us believe, either in the Act or in any committee report, that the platform, practice or policy of the Communist Party is to foment strikes for political purposes, or that such party subverts or misuses the National Labor Relations Board.

But even assuming, for the moment, that Congress, after an exhaustive investigation into the facts (which does not appear on the record), determined that the Communist Party advocated such a policy and effectuated it in the past (which also does not appear on the record), nevertheless, Section 9(h) could not constitute a reasonable means of effecting a cure of that evil. On the contrary, it constitutes an arbitrary and unreasonable deprivation, effective against members of the proscribed party. For this Court has held time and again that "under our traditions, beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." *Schneiderman v. U. S.*, 320 U. S. 118, 136. Accordingly, Congress could not reasonably attribute to any member of the Communist Party by virtue of his membership alone, any of the principles of the Communist Party, assuming such principles were established, and use that imputation as

a basis of denying to him any right or liberty to which he would have otherwise been entitled.

But this Act goes further. It imputes guilt to persons who are not even members of the Communist Party, but who merely are "affiliated with such party." If no imputation can be made that any particular policy of a political or other organization is that of any one of its members, clearly Congress cannot reasonably impute such policies to persons who are less than members but who merely chance to be "affiliated" with such organization. Even more clearly does this run counter to our basic concept that guilt is personal and that before one may be punished or deprived of his liberty or property, he personally is entitled to a trial to determine his rights. See *Herndon v. Lowry*, 301 U. S. 242; *DeJonge v. Oregon*, 299 U. S. 353.

But this statute goes further still—it does not merely apply the sanctions to the persons to whom guilt is thus wrongfully imputed. It applies those sanctions to members of the union of which such persons are officers. Thus the members of a union are punished because its officers may be "affiliated" with an organization to which Congress has ascribed certain unspecified and undescribed but presumably wrongful purposes. Thus, Congress has punished the members for guilt by association twice or thrice removed.

Nor is this an end to the absurdities of the statute. In most unions, officers are chosen either on a geographical or departmental basis. Thus a union member, residing in New York, might find that he and the union of his choice are affected by the sanctions of the Act because a vice-president of the union, elected by the union members in California, and over whom the New York members have no control, refused to take the required oath; or, likewise, a union member working in a wholesale establishment can no longer vote for a union of his own choosing in a labor board election because employees working in the warehouse

department of the union had elected a single officer whose beliefs are such that he might be deemed to be "affiliated" with the Communist Party. Thus, not only are the officers "affiliated" to the proscribed party and those who elected him to office, affected, but the sanctions of the Act are equally applied against members who had, and who could have no control as to whether he continue in office. A more arbitrary or irrational method of eliminating a wrongful practice, nowhere defined in the Act, becomes difficult to imagine, particularly where the stated policy of the Act is to promote the free choice by employees, of a union of their own choosing.

Nor can this Court give any weight to the argument of the Government that Congress could think of no more effective method to eliminate political strikes. As simply and effectively stated by Justice Roberts in *Schneider v. State of New Jersey*, 308 U. S. 147, 162, in a case where the evil practice complained of was littering the streets:

"There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."

So, too, here, assuming that the practice which Congress sought to eliminate was that of fomenting political strikes, and assuming also that Congress had the power to eliminate such strikes, an obvious method of preventing that practice would be to prohibit it and punish those who actually are guilty of violating that prohibition. But this it has failed to do. Possibly because Congress did not intend to eliminate political strikes at all, but to eliminate unpopular political belief.

Animosity towards a particular class of persons has more than once found its way into legislation, though it had no rational relation to any legitimate end.

In *Takahashi v. Fish & Game Commission*, 334 U. S. 410, as a result of the general hostility towards the Japanese prevailing in California, the State passed a law

providing in substance that no commercial fishing license might be issued to alien Japanese. The Court declared the law unconstitutional as violative of the Fourteenth Amendment. In the concurring opinion by Mr. Justice Murphy, with whom Justice Rutledge agreed, the issue was squarely presented as follows:

"Even the most cursory examination of the background of the statute demonstrates that it was designed solely to discriminate against such persons in a manner inconsistent with the concept of equal protection of the laws. Legislation of that type is not entitled to wear the cloak of constitutionality."

And, again:

"\* \* \* this discrimination constitutes an unequal exaction and a greater burden upon the persons of the class named than that imposed upon others in the same calling and under the same conditions, and amounts to prohibition. This discrimination, patently hostile, is not based upon a reasonable ground of classification and, to that extent, the section is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, \* \* \*"

"We should not blink at the fact that Section 990, as now written, is a discriminatory piece of legislation having no relation whatever to any constitutionally cognizable interest of California. It was drawn against a background of racial and economic tension. It is directed in spirit and in effect solely against aliens of Japanese birth. It denies them commercial fishing rights not because they threaten the success of any conservation program, not because their fishing activities constitute a clear and present danger to the welfare of California or of the nation, but only because they are of Japanese stock, a stock which has had the misfortune to arouse antagonism among certain powerful interests."

See also *United States v. Schneider*, 45 Fed. Supp. 848.

The courts therefore must look to the claimed abuse or evil, and legislate directly against that abuse. As pointed

out by Mr. Justice Hughes in the *DeJonge* case, *supra*, at page 364, even the rights of free speech or press or assembly could be abused by inciting to felonies or crime and the legislators might protect themselves against the abuse. "But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."

Here Congress has not legislated against a particular abuse. It has named no abuse. It has sought to punish both the officers and their labor organizations for what, so far as the record shows, can be only peaceable political activity.

The policies of the Act as set forth therein make the legislation at hand even more unlikely to accomplish the ends therein stated of protecting "the exercise by workers of full freedom of association, self organization and designation of representatives of their own choosing." On the contrary, without any rational basis Congress has denied the benefits of the Act to union members who have freely chosen officers who cannot swear to the affidavit required. They are deprived of a representative of their own choosing because that officer has been held to be guilty by association, a standard thoroughly discredited and condemned by our system of jurisprudence.

Also, the findings and policy of the National Labor Relations Act, as amended, make clear that strikes have the necessary effect of burdening or obstructing commerce, and therefore it is to elimination of the causes of strikes that the Act is directed. Yet, in withdrawing the facilities of the Act from certain unions and depriving them of rights which they previously enjoyed, it forces upon that union and the employees who desire to be represented by it, the necessity of resorting to strikes to protect themselves.

Thus, where a non-complying union represents a majority of the employees in any given shop, it is forced to resort to strike to secure recognition from a recalcitrant



employer, the facilities of the Board being unavailing, to establish its majority representation. Also, such a union cannot well afford to delay, for there is always the fear that another union may enter the picture, and through their use of the Board, eliminate the non-complying union. Similarly, where recognition is secured, the only method of forcing the employer to bargain collectively with it in good faith is through strike. Thus, 9(h) encourages the very thing which the Act is designed to eliminate.

For all of the reasons above set forth, this section cannot be deemed to be resting on any rational basis, but must be considered arbitrary and in violation of the Fifth Amendment.

## POINT IV

### SECTION 9(h) CONSTITUTES A BILL OF ATTAINDER.

The cases have been few in which this Court has been called to pass upon legislation in the nature of a bill of attainder. Possibly the repetition of such instances was sharply curtailed by the forthright and courageous manner in which the Court has dealt with such legislation when presented, despite the fact that the issue has inevitably arisen in times of deep emotion. This Court has asserted in terms clear beyond question that it would suffer no abridgement of the denial set forth in Article 1, Section 9 of the Constitution, and that the people would always be guaranteed freedom from any legislation of such infamous character, abhorred and declared prohibited for all time by the Framers.

But it is inevitable, once Congress starts down the road of oppression, denying the basic rights of free speech, assembly and political thought and imposing in lieu thereof its determination of what shall be orthodox in such matters, that it should end up with this most detested of all statutes—a bill of attainder.

In a discussion as to what constitutes a bill of attainder within the meaning of the constitutional prohibition, this Court in the most recent case involving such a bill (*U. S. v. Lovett*, 328 U. S. 303), unequivocally stated its adherence to the decisions rendered in the earlier cases which " . . . stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." The decisions have also made clear that while historically, and prior to the execution of the Constitution, a bill of attainder imposed the penalty of death, while legislation which imposed lesser punishments was in the nature of bills of pains and penalties, the prohibition contained in the Constitution encompassed all forms of punishment. Thus, the cases make clear that a legislative decree of exclusion from a chosen vocation may constitute such punishment.

Another principle, which was unequivocally established in the early case of *Cummings v. State of Missouri*, 4 Wall. 277, 71 U. S. 277, is that this prohibition includes punishment indirectly imposed if, in fact, punishment be the intent. As stated by Judge Field, at page 325:

"The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed [that Mr. Cummings, or all clergymen in the state of Missouri were guilty of armed hostility against the United States and therefore should be deprived of his or their right to teach or preach in the state] differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law maker in the case supposed would be openly avowed; in the case exist-

ing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, and not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizens should be secured against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

And, again, at page 327:

" \* \* \* they [the clauses in the Missouri Constitution] were intended to operate by depriving such persons [who had directly or indirectly aided the rebellion] of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the Constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else."

The remarks of Judge Field apply with equal force to the case at hand. For here, indeed, the statute presumes the guilt of the Communist Party, a clearly ascertainable group, and adjudges the deprivation of their right to pursue their lawful chosen vocation as trade union officials, unless the presumption be first removed by their expurgatory oath, an impossible oath for members of this group.

It cannot be contended that the legislation here merely set qualifications, as distinct from imposing punishment. Similar arguments were made and rejected in the *Cummings* case, *supra*, and in *Ex Parte Garland*, 4 Wall. 333,

71 U. S. 333. Justice Field in the *Cummings* case pointed to the fact that the oath was not required "as a means of ascertaining whether parties were qualified or not for their respective callings \* \* \*." And in *Garland, supra*, the Court stated: "The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution."

Here, it might be noted that on the face of the statute in question here it sets *no* qualifications for the position of trade union officials. Other legislatures, faced with the desirability of setting reasonable qualifications for doctors, lawyers, real estate brokers, insurance agents, or police officers, have found no insurmountable difficulty in so doing. But Congress did not even make the effort—possibly because members of the proscribed group might meet those qualifications. Rather Congress enacted legislation designed to secure by indirection the result which it openly stated it desired—removal of members of the proscribed group from their jobs. Thus Congress discarded the traditional guaranties of due process. It nowhere defined any harmful practice or abuse which it sought to eliminate; nor did it prohibit any such practice or abuse or provide appropriate penalties for violation, permitting of charges and trial to determine guilt. Rather, by enacting Section 9(h) they have usurped the judicial function; they have presumed and found certain ascertainable persons guilty of wrongful acts—a most circumspect method of setting qualifications, and one more consistent with an attempt to punish.

As a matter of fact the Congressional Record discloses that members of this named group were characterized in the course of the debates as disloyal, subversive, hated, as having no respect for their oath and, indeed, as believing in the violent overthrow of the Government, by force and violence. (e.g. 93 Cong. Rec. 3533, 3705, 3706, 5083, 5095.)

Indeed, these comments were so prevalent and the talk of punishment so constant as to cause Senator Aiken in the course of the debates to make the following remarks:

"I was merely going to say that if one advocates the overthrow of our Government by force, or if one puts the aims and desires of another country ahead of those of the United States, while living here as a citizen, as I understand the law, such a person is *guilty of treason*; and I submit that throwing him out of a labor union is hardly a fit *punishment* for the crime. Is it not a fact that we have laws which inflict *very serious punishment* upon one who advocates the overthrow of the Government by force, or who owes allegiance to a foreign country instead of the country of which he claims to be a citizen?" (93 Cong. Rec. 5085, May 9, 1947; emphasis supplied.)

And, again:

"Mr. Aiken: I do not know about that, but what prompted me to rise was the statement that persons were advocating the overthrow of the United States Government by force. It seems to me that expulsion from a labor union is hardly *fit punishment* in such a case." (93 Cong. Rec. 5085, May 9, 1947; emphasis supplied.)

It is interesting to note that H. R. 3020 as originally passed by the House specifically contained a retrospective provision. It provided:

"No labor organization shall be certified as the representative of employees if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot . . . is *or ever has been* a member of the Communist Party . . . ." (Emphasis supplied.)

There was much discussion concerning these words "or ever has been" in both House and Senate, primarily with reference to whether this provision was fair to members of the Communist Party who had since "purged" themselves.



"Mr. Hartley: \* \* \* Mr. Chairman, it is with very great reluctance that I oppose the amendment which has just been offered. I understand thoroughly the purpose of the amendment, and I want just as much as the gentleman who offered it to drive the Communists out of our labor organizations, but I do not want to deprive one who has seen the light and who has made an *honest reform* of the right to be a member of a labor organization." (93 Cong. Rec. 3705, April 17, 1947; emphasis supplied.)

And Mr. Potts, in that same discussion:

"Mr. Chairman, I hold no brief for the Communists, but I know there are a number of people all over the country today who are making mistakes and I want to give them the chance to *repent*. Members of the American Youth for Democracy, that Communistic organization which I deplore, comprise many of those young people. I do not want to deprive the members of that group who subsequently *repent of their wrong*, from ever earning a living in any field of proper endeavor. I think the amendment is wrong for this reason." (93 Cong. Rec. 3706, April 17, 1947; emphasis supplied.)

Mr. Mundt then suggested a modification by substituting for the words "or ever has been" the words "or has within five years immediately preceding the date." After discussing at some length how men who were once Communists have reformed and dedicated themselves to fight Communism, he added:

"For that reason I have offered this amendment to bar from holding offices in labor unions any one connected with the Communist Party at any time within five years preceding the day the case is brought up for consideration. To attempt to *punish* a man for his entire lifetime for a mistake which he has publicly admitted and corrected, however, seems to be unnecessarily drastic and punitive, and I believe it would be less effective than setting up some such effective date as I propose." (93 Cong. Rec. 3707, April 17, 1947; emphasis supplied.)

However, these amendments were eliminated by the conference committee, and Conference Report No. 510 on H. R. 3020 reads as follows:

"The 'ever has been' test that was included in the House bill is omitted from the conference agreement as unnecessary, since the Supreme Court has held that if an individual has been proved to be a member of the Communist Party at some time in the past, the presumption is that he is still a member in the absence of proof to the contrary."

The House Minority Report No. 245 on H. R. 3020 stated:

" \* \* \* No one abhors Communists or Communism more than we. However, it is clear that this provision is *designed to penalize* not only members of the Communist Party or those affiliated with them, but equally to *penalize* by denying their union the right to exist, those persons within the trade union movement who have been most active in seeking to rid the trade union movement of Communist influence. Its effect by placing all members of the union under the same penalties as its Communist members or officers would be to strengthen rather than weaken Communist trade union infiltration." (Emphasis supplied.)

A reading of these debates and reports clearly demonstrates that the intent of Congress in enacting Section 9(h) and the atmosphere attendant on its passage was one to "punish" rather than to regulate or set legitimate qualifications for the vocation of trade union officer. While the record is replete with talk of penalties, punishment, disloyalty, subversive, purge, etc. (*cf. United States v. Lovett, supra*, p. 314), in relation to this named group, it is barren concerning appropriate qualifications for the position of trade union officer or a prohibition or even a definition of any abusive practices by such trade union officers.

Section 9(h) in depriving the members of the proscribed political party from using Government facilities and in seeking and indirectly causing its members to be driven

from their jobs can be held no more valid than if that section had provided that specifically named Communist officials such as William Z. Foster, Eugene Dennis and John Williamson not be permitted to use the facilities of the Board, and not be permitted to hold office as labor union officers because of their "subversive" activities. Could it be doubted that such a statute would constitute a bill of attainder and would amount to punishment by legislative act of named persons? The decision in the *Lovett* case, *supra*, makes this clear. However, as it is not of the essence of a bill of attainder that individuals be named specifically, but merely that it apply to easily ascertainable members of a group, the law being invalid when applied to one must be equally invalid when applied to the other. For clearly members of the Communist Party are easily ascertainable members of a group.

It should be noted that the statute at hand goes further than that in the *Lovett* case. In fact it meets the specific requirement which the concurring opinion described as one of the elements historically inherent in bills of attainder. For here "Refusal to take a prescribed oath operated as an admission of guilt and automatically resulted in the disqualifying punishment." *Lovett* case, concurring opinion, page 327.

It is for the above reasons that the cases cited by the Government, such as *Dent v. West Virginia*, 129 U. S. 114, or *Haucker v. New York*, 170 U. S. 189, are completely inapposite. In those cases the legislation dealt with general qualifications for a particular job and was addressed to particular evils. It applied to no one person or group of persons, nor was it aimed against or intended as punishment of any one person or group of persons. A basic distinction must be drawn between legislation (such as the *Dent* case) which is aimed against the evil, and legislation (such as that at hand) which is aimed against the person or members of the proscribed group.

It is significant to note that bills of attainder from the earliest recorded instances of their use in England in the

late 13th Century have virtually always been a means of punishment of political offenders, whose views were obnoxious to the dominant party. See Creasy, E. S., *Rise and Progress of the English Constitution* (3d ed. 1856) p. 252; Adams, Geo. B., *Constitutional History of England* (Schuyler rev. 1934) pp. 228-229, 280; Naismith, *English Public Law* (1873) p. 153; Stephens, *History of Criminal Law of England* (1883) Vol. 1, pp. 160-161; Anson, *Law and Customs of the Constitution* (5th ed. 1922) Vol. 1, p. 362; Story, *Commentaries on the Constitution* (5th ed. 1891) Sec. 1344; Medley, *English Constitutional History* (6th ed. rev. 1925) p. 167.

"Subverting the government" was a common charge in the late modern period when, at the close of the long quarrel between Commons and the Stuarts, bills of attainder had a brief renewal of popularity. Notorious among the English attainders by Act of Parliament was that of the Earl of Strafford, counsellor of Charles I, on the ground that he had endeavored "to subvert the ancient fundamental Laws and Government." 17 Car. 1. *De Lolme on the Constitution* (1838 ed.) Vol. 1, p. 400; Humie, *History of England* (Brewer ed. 1880) pp. 183 *et seq.*; Medley, *supra*, p. 167; Feilden, Henry, *Constitutional History of England* (4th ed. rev. 1911) p. 153. Similarly in 1645 a preliminary impeachment against Archbishop Laud was converted into an attainder for attempting to alter the religion and fundamental laws of the realm. Howell, *State Trials*, Vol. IV, 598-599. See Feilden, *ibid*; Medley, *ibid*. See also Hallam's discussion of the origin of the idea of constructive treason. *Constitutional History of England*, (Henry VIII through Geo. III) (5th ed. 1870) p. 576n. In 1715, the "Jacobite" Lords Bolingbroke and Ormond were impeached for acts prejudicial to the national welfare, i.e., their share in the peace of Utrecht, and later attainted on failing to surrender. 1 Geo. I, cc. 16, 17, Howell, *State Trials*, Vol. XV, 1002, 1012. See, Feilden, *supra*, p. 156; also, note 36 *supra*.

Statutes of this kind were passed in practically every state during and immediately after the revolutionary period in our own country. See Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 Ill. Law Rev. 81, 153; Hamilton, *History of the Republic of the United States*, Vol. III, pp. 23-40.

Not only have bills of attainder been directed in almost every case at political offenses, but they have reappeared on the historical scene almost exclusively in times of political intolerance and hysteria. In such times normal judicial methods of punishing persons who are supposed to be guilty of offenses is often considered inadequate, either because the conduct of the accused violates no existing law, or because sufficient proof could not be adduced in a court of law to find the accused guilty of existing offenses. And so the legislature takes the most expedient path—creates the offense and finds guilt. Judge Story warned against precisely such action in his *Commentaries*:

In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency and too often under the influence of unreasonable fears, or unfounded suspicions. . . . Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and trample upon the rights and liberties of others. . . . (Commentaries on the Constitution, Sec. 1338).

It is likewise characteristic of bills of attainder, that being almost always political in their nature and being by



definition arbitrary, they invariably constitute violations of the First and Fifth Amendments of the Constitution as well. For, as James Madison stated in writing about bills of attainder and other prohibited types of legislation in *The Federalist*, No. 44, " \* \* \* one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding."

It is therefore not surprising that the 80th Congress, sitting in an atmosphere of unreserved hysteria, and enacting legislation attacking our other basic rights of free speech, assembly and belief, should have compounded its offenses, by enacting a bill of attainder.

## CONCLUSION

The statute now before the Court cannot properly be viewed as an isolated phenomenon. On the contrary, Section 9(h) is a direct reflection of a widespread and bitter attack upon the civil rights of Americans—an attack which has received an all-embracing official sanction.

Committees established by the 80th Congress, notably the Un-American Activities Committee, and the Committee on Education and Labor have become the self-appointed guardians of political thought. They have pinned badges of disloyalty on large numbers of patriotic citizens who have advocated political, economic or social reforms, which do not meet the approval of members of those Committees. Indiscriminate character assassination of well known leaders in Government, the liberal arts and sciences have become a regular feature of the daily press. Notorious are the attacks on such men as Dr. Edward U. Condon and the late Dr. Harry B. White. Hundreds of persons have been called before the Committees which have demanded that they disclose to all the world their political beliefs and associations, and those of their friends. Throughout the land, bigotry has been made not only respectable but noble.

These facts need no extensive documentation, as they are well known to the Court. Indeed, this Court need only consider the cases now on its docket and those in the lower Federal courts to see how widespread is the attack on non-conformists. Dr. Edward Barsky, John Howard Lawson, Gerhart Eisler, and many others, stand convicted of contempt of Congress. Several persons in Colorado have been convicted of contempt of a Federal court for refusal, on asserted constitutional grounds, to answer questions put by a grand jury, and had to appeal to a Justice of this Court to get bail. Carl Marzani's conviction for violation of the False Claims Act has already been decided by this Court. Twelve leaders of the Communist Party are about to be tried for violation of the Alien Registration Act. Irving Potash, Michael Obermeier and other leading trade unionists face deportation to foreign lands they left twenty to forty years ago. Scores of similar instances could easily be added. They will occupy our courts for years to come.

Indeed, the principles of fear and intolerance which we fought a war to destroy in other lands, seem to have taken root in our own. We might, with profit, reflect on the words of Thomas Jefferson in his first inaugural address that

" . . . , we have yet gained little if we countenance a political intolerance as despotic, as wicked, and capable of as bitter and bloody persecutions. During the throes and convulsions of the ancient world, during the agonizing spasms of infuriated man, seeking through blood and slaughter his long-lost liberty, it was not wonderful that the agitations of the billows should reach even this distant and peaceful shore; that this should be more felt and feared by some and less by others; that this should divide opinions as to measures of safety. But every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all republicans—we are federalists. If there be any among us who would wish to dissolve this Union or to change its republican form, let them

stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

More recently and in times not unlike our own, Justice Holmes reaffirmed this principle, so necessary to the survival of our democracy:

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes can be safely carried out. That, at any rate, is the theory of our Constitution" (*Abrams v. U. S.*, 250 U. S. 616).

It is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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**APPENDIX A****Text of Provisions of the Labor Management Relations Act Referred to Herein**

**SECTION 1.** The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strike or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences

as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 8(b)(4)(C): It shall be an unfair labor practice for a labor organization or its agents . . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is; forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9 . . . .

. . . . .

SEC. 9(a): Representatives designated or selected for the purposes of collective bargaining by the majority of



the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(e)(1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and by-

laws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such

receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(e)(1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

SEC. 10(e): The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order.

and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by

the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

SEC. 10(1): Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 9(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant



testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

## APPENDIX B

Excerpts from an Essay on the Liberty of  
the Press (1789)

By GEORGE HAY

"To ascertain what the 'freedom of the press' is, we have only to ascertain what freedom itself is. For, surely, it will be conceded, that freedom applied to one subject, means the same, as freedom applied to another subject.

"Now freedom is of two kinds, and of two kinds only: one is, that absolute freedom which belongs to man, previous to any social institution; and the other, that qualified or abridged freedom, which he is content to enjoy, for the sake of government and society. I believe there is no other sort of freedom in which man is concerned.

"The absolute freedom then, or what is the same thing, the freedom, belonging to man, before any social compact, is the power, uncontrolled by law, of doing what he pleases, provided he does no injury to any other individual. If this definition of freedom be applied to the press, as surely it ought to be, the press, if I may personify it, may do whatever it pleases to do, uncontrolled by any law, taking care however, to do no injury to any individual. This injury can only be by slander or defamation, and reparation should be made for it in a state of nature, as well as in society.

"But freedom in society, or what is called civil liberty, is defined to be, natural liberty, and so far restrained by law as the public good requires, and no farther. This is the definition given by a writer, particularly distinguished for the accuracy of his definitions, and which perhaps cannot be mended. Now let freedom, under the definition, be applied to the press, and what will the freedom of the press amount to? It will amount precisely to the privilege of publishing, as far as the legislative power shall say, the public good requires: that is to say, the freedom of the press will be regulated by law, in the same manner

as freedom on other subjects is to be regulated by law. If the word freedom was used in this sense, by the framers of the amendment, they meant to say, Congress shall make no law abridging the freedom of the press, which freedom, however, is to be regulated by law. Folly itself does not speak such language.

"It has been admitted by the reader, who has advanced thus far, that the framers of the amendment meant something. They knew, no doubt, that the powers granted to Congress, did not authorize any control over the press, but they knew that its freedom could not be too cautiously guarded from invasion. The amendment in question was therefore introduced. Now if they used the freedom under the first definition, they did mean something, and something of infinite importance in all free countries, the total exemption of the press from any kind of legislative control. But if they used the word freedom, under the second definition, they meant nothing, or nonsense, which is worse than nothing; for if they supposed that the freedom of the press, was absolute freedom, so far restrained by law as the public good required, and no farther, the amendment left the legislative power of the government on this subject, precisely where it was before. But it has been already admitted that the amendment had a meaning: the construction therefore which allows it no meaning is absurd, and must be rejected.

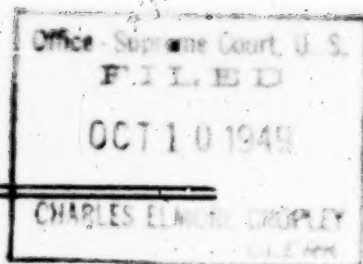
"This argument may be summed up in a few words. The word 'freedom' has a meaning. It is either absolute, that is, exempt from all law, or it is qualified, that is regulated by law. If it be exempt from the control of law, the Sedition Bill which controls the 'freedom' of the press, is unconstitutional. But if it be regulated by law, the amendment which declares that Congress shall make no law to abridge the freedom of the press, which freedom however may be regulated by law, is the grossest absurdity, that ever was conceived by the human mind.

"That by the words 'freedom of the press' is meant a total exemption of the press from legislative control, will further appear, from the following cases, in which it is

manifest, that the word freedom is used with this signification and no other.

"It is obvious in itself, and it is admitted by all men, that freedom of speech, means the power uncontrolled by law, of speaking either truth or falsehood at the discretion of the individual, provided no other *individual* be injured. This power is, *as yet*, in its full extent in the United States. A man may say every thing which his passion can suggest, he may employ all his time and all his talents, if he is wicked enough to do so, in *speaking* against the government matters that are false, scandalous, and malicious, but he is admitted by the majority of Congress to be sheltered by the article in question, which forbids a law abridging the freedom of speech. If then freedom of speech means, in the construction of the constitution, the privilege of speaking *any thing* without control, the words freedom of the press, which form a part of the same sentence, mean the privilege of printing *any thing* without control.

"Happily for mankind, the word 'freedom' begins now to be applied to religion also. In the United States it is applied in its fullest force, and religious freedom is completely understood to mean the power uncontrolled by law of professing and publishing any opinions on religious topics, which any individual may choose to profess or publish, and of supporting those opinions by any statements he may think proper to make. The fool may not only say in his heart, there is no God, but he may announce if he pleases his atheism to the world. He may endeavor to corrupt mankind, not only by opinions that are erroneous, but by facts which are false. Still however he will be safe, because he lives in a country where religious freedom is established. If then freedom of religion will not permit a man to be punished, for publishing any opinions on religious topics, and supporting those opinions by false facts, surely freedom of the press, which is the medium of all publications, will not permit a man to be punished for publishing any opinion on any subject, and supporting it by any opinion whatever."



IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1948**

No. **10**

AMERICAN COMMUNICATIONS ASSOCIATION, CIO,  
JOSEPH P. SELLY, etc; et al.,

*Appellants,*

v.

CHARLES T. DOUDS, individually and as Regional Director of  
the National Labor Relations Board, Second Region.

**REPLY BRIEF FOR APPELLANTS**

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IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1948**

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**No. 336**

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**AMERICAN COMMUNICATIONS ASSOCIATION; CIO,  
JOSEPH P. SELLY, etc., et al.,**

**Appellants,**

**CHARLES T. DOUDS, individually and as Regional Director of  
the National Labor Relations Board, Second Region.**

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**REPLY BRIEF FOR APPELLANTS**

Most of the arguments made by the Government in its brief were anticipated in the brief heretofore filed by appellants and no reply is necessary. Many of the contentions of the Government, and particularly those respecting the effect of this legislation upon a non-complying union, are answered so completely by the *amicus* brief filed herein by the Congress of Industrial Organizations, that no further discussion is required. This brief will therefore be confined to the few issues on which further discussion seems necessary, to the relevant cases decided since the submission of our principal brief, and to some comment on the Government's argument that the statute meets the "clear and present danger" test, an argument made now for the first time.

## POINT I

**Section 9(h) restricts first amendment rights, not conduct.**

The heart of the Government's argument is that "Neither membership in the Communist Party nor belief in violent overthrow of the government are, as such, targets of the statute. The target is potential *conduct* which stems from such membership or belief." (Government's Brief, p. 14: italics in original.)

But the very language of the statute and its legislative history (Appellants' Principal Brief, pp. 40-44) clearly negate this contention of the Government. Indeed, it seems presumptuous to urge upon this Court that although Congress specifically conditioned the use of the Board's facilities upon the disavowal of certain beliefs and political affiliations, Congress meant something quite different, i.e., to regulate and eliminate certain conduct of union officers which, it is alleged, such beliefs and affiliations are likely to create.

But assuming, *arguendo*, that Congress was in fact seeking to eliminate certain conduct deemed to be undesirable, under our Constitution and the cases interpreting it, Congress must then specifically legislate against that conduct. It may not make broad restrictions on our basic freedoms to eliminate the narrower abuse. Thus, for example, although the conduct of littering the streets might be an appropriate target of legislation, a legislature cannot prevent leaflet distribution to accomplish that end. *Schneider v. New Jersey*, 308 U. S. 147. Likewise, fraud is an abuse which legislation might properly try to eliminate, but a legislature cannot reach that end by requiring religious groups to be licensed before they may canvass from door to door. *Murdock v. Pennsylvania*, 319 U. S. 105; *Jones v. Opelika*, 316 U. S. 584, reversed on argument, 319 U. S. 103. Therefore, even were elimination of certain improper conduct the actual aim of this legislation, imposing a dis-



ability based on one's belief or political affiliation must be held an improper and unconstitutional method of achieving that end. *Thomas v. Collins*, 323 U. S. 516.

To our contention (Appellants' Principal Brief, pp. 62, 64) that Congress should have legislated directly against the abuse, the Government disingenuously answers that the mere existence of alternate remedies does not make the one chosen unconstitutional. This answer fails to meet the point of appellants' argument. We do not complain because Congress chose the less desirable of several alternatives. We complain because the alternative chosen is unconstitutional—and it is unconstitutional precisely because, under our Constitution, where an evil can be prevented without interfering with First Amendment rights, the legislature may not discard such means of prevention in favor of a method which will infringe First Amendment rights.

Thus, we may not under our Constitution enjoin a paper from being published because we have reasonable grounds to believe that it may print libelous matter. We may only make the actual printing of libelous matter a civil wrong or a crime, and punish one who engages in such wrongful conduct. *Near v. Minnesota*, 283 U. S. 697.—

It is this fundamental doctrine which was so grossly repudiated by the 80th Congress. For the First Amendment speaks unequivocally and while some limitations may, under exceptional circumstances, be imposed on the rights of free speech, press and assembly, to eliminate serious evils (see Point II below), the legislation must aim at the evil and not at the First Amendment rights. Thus, legislation which seeks to restrict or penalize beliefs or their simple expression, cannot validly be enacted. As the Circuit Court of Maryland recently stated in declaring unconstitutional the Ober Act, passed by the legislature of that state:

"The law deals with overt acts, not thoughts. It may punish for acting, but not for thinking." *Lancaster v. Hammond*, The Daily Record, Baltimore, August 16, 1949.

Thus, if in fact Congress felt that those who believed in an unpopular ideology might tend toward conduct which would be harmful to our Government, or be contrary to the general welfare of our people, it may take steps necessary to prevent or punish such conduct. It may not suppress the ideology or penalize those who believe in it.

The Government urges that this statute is aimed at conduct. By an involved process of reasoning, with which we cannot agree (see Point II below), the Government has come to the conclusion that the conduct which Congress aimed to eliminate was unrest in labor unions and political strikes which might under some circumstances seriously injure the United States in its relations with the Soviet Union.

A law restricting free speech because it tends to create unrest, as this Court has but recently pointed out, would be unconstitutional. *Terminiello v. Chicago*, 337 U. S. 1. As to the elimination of political strikes, if that was what Congress sought to eliminate, it might easily have so stated. For in the past, Congress found no difficulty in framing legislation which prevented or punished conduct which it found to constitute substantive evils in this and related fields. As the Court said in *Lancaster v. Hammond*, *supra*:

"Many penal statutes are now on the law books dealing with such activities, as for example, acting as agent of a foreign government without notification to the Secretary of State, 18 U. S. C., section 951; possession of property in aid of a foreign government for use in violating any penal statute or treaty rights of the United States, 18 U. S. C., section 957; espionage activities, 18 U. S. C., sections 793-797; inciting or aiding rebellion or insurrection, 18 U. S. C., section 2384; advocating overthrow of the government by force, 18 U. S. C., section 2385; treason, 18 U. S. C., section 2381; misprision of treason, 18 U. S. C., section 2382; undermining loyalty, discipline or morale of armed forces, 18 U. S. C., section 2387; sabotage, 18 U. S. C., section 2156; importing literature advocating treason, insurrection or forcible resistance to any fed-

eral law, 18 U. S. C., section 552; injuring federal property or communications, 18 U. S. C., section 1361. Organizations engaged in civilian military activity, subject to foreign control, affiliated with a foreign government, or seeking to overthrow the government by force are subject to registration requirements under the Voorhis Act, 18 U. S. C., section 2386. And we have the general law of conspiracy, a powerful weapon in the hands of a skillful prosecutor."

This listing barely scratches the surface. There are innumerable others, such as 18 U. S. C. 953, which regulates correspondence between a private citizen and a foreign government; 18 U. S. C. 954, concerning the wilful making of any untrue statement which will influence a foreign government in its relations with the United States; 18 U. S. C. 955, which regulates dealing in the securities of a foreign government; 18 U. S. C. 961, relating to the strengthening of an armed vessel of a foreign nation; 18 U. S. C. 967, which regulates departure of vessels from the United States during a war in which the United States is a neutral nation; 18 U. S. C. 2152, which prohibits sabotage to fortifications or harbor defenses; 18 U. S. C. 2153, which prohibits the destruction of war material; 18 U. S. C. 2154, which prohibits the production of defective war material; 18 U. S. C. 2155, which prohibits the destruction of national defense materials; and 18 U. S. C. 2383, which prohibits anyone from engaging in a rebellion or insurrection against the United States. And if the prohibition of political strikes is the evil which Congress here sought to eliminate, it has precedent in the Espionage Act of the first World War (40 Stat. 533), the Act under which the convictions were obtained in *Abrams v. U. S.*, 250 U. S. 616. See also the War Labor Disputes Act of 1943 (Public No. 89, Ch. 144, 78th Congress, 1st Sess.).<sup>1</sup>

The distinction between conduct and the expression of ideas, and the degree to which each is subject to govern-

<sup>1</sup> Appellants, of course, do not express any opinion with reference to the merits of any of the statutes referred to.

mental restriction was fully discussed by the several opinions of this Court in *Terminiello v. Chicago*, 337 U. S. 1. While the Court split on the precise issues there presented, both the majority decision and the dissent of Mr. Justice Jackson (concurring in by Justices Frankfurter and Burton) expressed disapproval of legislation such as is presented in the instant case.

The majority emphasized, and indeed it may well bear emphasis in these days when civil rights have been subject to attacks on all fronts, that "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *DeJonge v. Oregon*, 299 U. S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is affected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." Justice Douglas continues:

"Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire*, *supra*, pp. 571-572, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See *Bridges v. California*, 314 U. S. 252, 262; *Craig v. Harney*, 331 U. S. 367, 373. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

"The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand."

How indeed, then, can the Government hope to justify this legislative edict which seeks to eliminate from the trade union movement those of a particular belief, even were the Government's explanation of the rationale of the law accepted, i.e., that Communists might tend to cause unrest in labor unions. For Mr. Justice Jackson agreed with the general principles of the majority in *Terminiello*, but felt that they were not applicable because the behavior of the defendant, under all of the circumstances there presented, were provocations to violence and incited riot. The dissent condemned this "concrete behavior" of the defendant and held that it was not entitled to constitutional protection. But this legislation does not even contain a reference to concrete behavior, much less a prohibition. On the contrary, it employs the very tactic of suppression which the *Terminiello* dissent deplored:

" \* \* \* Suppression has never been a successful permanent policy; any surface serenity that it creates is a false security, while conspiratorial forces go underground. My confidence in American institutions and in the sound sense of the American people is such that if with a stroke of the pen I could silence every fascist and communist speaker, I would not do it. \* \* \* "

Justice Jackson further stressed that:

"It is the legal right of any American citizen to advocate peaceful adoption of fascism or communism, socialism or capitalism. He may go far in expressing sentiments whether pro-semitic or anti-semitic, pro-negro or anti-negro, pro-Catholic or anti-Catholic. He is legally free to argue for some anti-American system of government to supersede by constitutional methods the one we have. It is our philosophy that



the course of government should be controlled by a consensus of the governed. This process of reaching intelligent popular decisions requires free discussion. Hence we should tolerate no law or custom of censorship or suppression."

The 80th Congress felt otherwise. It would serve us little to urge such principles as the basis upon which our democracy rests were we to approve legislation which so ruthlessly deprives those of a particular political sentiment of the use of a vital facility open and available to all others. For the 80th Congress, in its desire to silence a view which it regarded as offensive, overlooked or cast aside this policy upon which our democracy is founded.

Appellants would like to call the Court's attention to two other matters:

1. In appellant's Principal Brief it was argued that the statute was unconstitutionally vague and that it constituted a bill of attainder. We also noted at that time that such defects were not merely incidental, but were basic to this kind of legislation. Confirmation of this may be found in the decision mentioned above, declaring the Maryland Ober Act to be unconstitutional. That Act placed restrictions on "a member of a subversive organization" and "the World Communist Movement." Not only did the Court there find that the Act was a violation of the freedom of speech provisions of both the United States and Maryland Constitutions, but it further found that the statute was void both for vagueness and because it was a bill of attainder. *Lancaster v. Hammond, supra.*

2. The appellants would like further to call the Court's attention to an argument made by the Government at page 60 of its brief, that "Certainly Congress has the power to require the disclosure by those who compete for employees' support, of information which the employees might consider highly relevant to their choice. \* \* \*"

Such a hypothetical statute is, of course, not before us, since Section 9(h) is not a disclosure statute at all, but imposes disabilities on persons with proscribed beliefs and affiliations. We would not consider the matter worthy of comment were it not for the fact that the District Court in *National Maritime Union v. Herzog*, 78 F. 2d 146, 163 *et seq.*, was apparently under the impression that Section 9(h), like Sections 9(f) and (g), is a disclosure statute. It will be remembered that the Court below in this case relied exclusively on *NMU v. Herzog* (R. 20).

However, we should not like to allow the Government's general contention with respect to disclosure statutes to pass without comment. We emphatically deny, for example, that Congress might compel a union officer to disclose his religion, whether or not the employees might consider it relevant, and we seriously question Congress' right to compel disclosure of one's political beliefs. Such a requirement is but one step removed from a requirement that those of certain political or religious beliefs wear distinctive armbands. The assurance with which the Government makes its contention is but a further indication of the extent to which it has gone in approving government control and interference with belief and other civil liberties.<sup>2</sup>

<sup>2</sup> The wide gulf between our thinking on this subject and that of the Government's is perhaps best illustrated by the hypothetical case appearing on page 94 of the Government's brief. It is there contended that a person who believed that one might take whatever one wants, wherever one finds it, could constitutionally be prohibited from being employed as a bank guard or bank president. We would seriously question the constitutionality of such a statute. One might well believe certain steps to be desirable without ever intending to act upon that belief.

## POINT II

### The "clear and present danger" test is inapplicable.

The Government, realizing the tenuous nature of its principal argument (See Point I, above) has here, for the first time, taken refuge in the contention that a clear and present danger warranted the legislation.<sup>3</sup>

The expression "clear and present danger of a substantive evil which Congress has the right to prevent" has never been closely defined and is probably not susceptible of exact definition. But its general import had been made fairly clear by a long series of decisions concerning civil liberties.

As the First Amendment speaks unequivocally in denying Congress the right to make laws abridging the freedom of speech, press and assembly, it is only in the most extreme of cases and where absolutely necessary to preserve national safety or peace and order that the courts will countenance any invasion of these rights. The "substantive evil" may not be extended to cover *any* undesirable state of affairs which needs correction, or the language of the First Amendment would be rendered meaningless. It must be an evil which "rises far above public inconvenience, annoyance, or unrest." *Terminiello v. Chicago*, 337 U. S. 1.

Analysis of the cases reveals that there are but two general classes of evils which are so substantial and serious that the courts have felt that, when imminent, they warrant a temporary exception to the all-inclusive provisions of the First Amendment. The first group is that which imperils the security of our Nation and is therefore

<sup>3</sup> The Government (Brief, p. 52) disavows any intention of having conceded in the Court below that there was no clear and present danger, and alleges that Judges Riskind and Major (and, we might add, Judge Prettyman) all "misunderstood" the Government's contention. We regret that we, with the three dissenting Judges, likewise misunderstood the Government's position.

peculiarly within the area in which the national Congress acts, although State sedition laws come within the same category. *Schenck v. U. S.*, 249 U. S. 47; Holmes, J., dissenting in *Abrams v. U. S.*, 250 U. S. 616; *Herndon v. Lowry*, 301 U. S. 242. The second is the obscene, the libelous, the "fighting words" which incite to violence; in short, the type of conduct which normally comes within the jurisdiction of the state police in their function of preserving law and order. (*Chaplinsky v. New Hampshire*, 315 U. S. 568.) These evils must be real, not speculative; they must be imminent (*Bridges v. California*, 314 U. S. 252)—indeed, so imminent that discussion or appeal to reason would prove unavailing to prevent them. (Brandeis, J., concurring in *Whitney v. California*, 274 U. S. 357.)

The mere holding of a belief of whatsoever nature, without more, clearly could not constitute such a clear and present danger of a substantive evil. Thus, to punish or impose disabilities for the holding of a particular belief could, under no circumstances, be valid. Likewise, the mere expression of an opinion or the peaceful exchange of ideas, no matter how abhorrent, could not constitute such danger. Indeed, it was precisely to encourage such an exchange that the First Amendment was written. It is the preservation of such rights which the courts have zealously guarded because it is only such free interchange of ideas that can prevent intolerance, violence, and other menaces to peace and order.

It is only where the particular utterance is in a context of disorder or where it involves the safety of our country that the question of censorship or suppression may be raised. As stated by Mr. Justice Jackson in his dissent in *Terminiello v. Chicago*, *supra*:

"Law is so indifferent to subjects of thought that I can think of none that it should close to discussion. Religious, social and political topics that in other times or countries have not been open to lawful debate may be freely discussed here."

Thus, it is doubtful whether Congress could ever censor any political utterance, except in time of war or grave national emergency. In each of the cases where such a law was passed and such an utterance was punished, the Court has gone into the question in detail to determine whether in fact the utterances made were "in such circumstances" and "are of such nature" as to result imminently in danger to national security.

In cases where the state (as distinguished from Congress) has limited the absolute right of free speech, it has been in exercise of its police power to prevent breaches of peace, where in particular circumstances, a precise utterance was part of an act of force or violence, obscenity or libel. In these cases, too, censorship or punishment is inflicted only after a full and fair trial in which the court likewise must find that the particular utterance did in fact give rise immediately and directly to the violence or other substantive evil. (*Herndon v. Lowry*, 301 U. S. 242.)

Let us turn now to the statute at hand to determine whether the clear and present danger test can possibly be applied in the case before this Court.

The first question which confronts us is as to the nature of the "substantive evil" which Congress here sought to eliminate. Neither the statute itself, nor its legislative history make mention of any such evil. (See Appellants' Principal Brief, pp. 40-51, 57-64, *infra*, pp. 15, 16).

But, for the moment, let us assume as the Government urges, that Congress enacted the statute to correct what it considered a substantive evil, namely, "the danger of harmful obstruction to interstate commerce which is likely to result if Communists are in control of labor organizations" (Government's Brief, p. 56). This is elsewhere further amplified, but in substance, the sum total of the Government's contention is that the obstruction referred to is political strikes which it alleges Communists are likely to call.<sup>3a</sup>

<sup>3a</sup> An interesting commentary on the Government's contention that the danger sought to be eliminated by Section 9(h) is the tendency



But it can hardly be claimed that every political strike under all circumstances can meet the clear and present danger test. For the cases make clear that when we are discussing Congressional action, the evil the Supreme Court talks about must be of such a nature that there is "a reasonable apprehension of danger to organized government" (*Herndon v. Lowry*, 301 U. S. 242) and must be so imminent that the evil "may befall before there is an opportunity for full discussion." (Brandeis, J., concurring in *Whitney v. California*, 274 U. S. 357.)

While it may be true that the conditions obtaining in some strikes, political or otherwise, may meet this test, clearly it cannot be true of all. For example, a nation-wide railroad strike in time of war may constitute a clear and present danger to our national security, but can the same be said of a local strike in time of peace in the office of a retail chain store? The railroad strike is hypothetical, but the strike in the retail store is not, and is the subject of *Osman v. Doubs*, No. 404 on the docket of this Court. A nation-wide telephone strike in time of war might be the emergency the Court speaks about in the cases cited, but the same can hardly be true of a strike in a small press communications service in time of peace.

But this is not the only problem posed by the Government's contention as to the purpose of this legislation. Just as there is no foundation for the contention that all political strikes, under all circumstances, constitutes a substantive evil, so there is no justification for the broad in-

of Communists to call political strikes is furnished by the recommendation of the Joint Committee on Labor Management Relations, the Chairman of which was Senator Ball, the Vice-Chairman of which was Congressman Hartley, and which included among its members Senator Taft. That Committee recommended that Section 9(h) be amended to include the requirement that employers file a similar oath (Report of the Joint Committee on Labor Management Relations, 80th Congress, 2d Sess., Report 986, Part 3, December 31, 1948, p. 6). The Wood bill, passed by the House in the 81st Congress, contained such a provision (H. R. 4200). If Congress intends to punish Communists, as we argue, the rationale of this suggestion is self-evident. But if Congress intended to prevent political strikes, how does the Government explain this latest proposal?

clusion of all Communists within the prohibition of the statute, on the ground that all would bring about the evil Congress seeks to correct. Do all Communists call political strikes? The Government has never taken that position, and we do not understand that it takes it now. On the contrary, the Government's argument in *NMU v. Herzog*, which it repeated in the Court below in this case, specifically disavowed any such contention. Judge Prettyman, in his dissent in the *NMU* case, commented extensively on this fact. 78 Fed. Supp. 146, 181, 182; Appellants' Principal Brief, pp. 60-62.

But legislation, in order to meet the clear and present danger test, must be narrowly drawn. Further, the circumstances of each particular case must be judged on its own merits, as Mr. Justice Holmes made so clear in his original formulation of the test.

Let us apply these principles to the case at hand. The plaintiffs whose First Amendment rights have been abridged by this legislation are the plaintiff union, the plaintiff officers, and the plaintiff member. There are no facts in the record before this Court from which a finding could conceivably be made that any of these three plaintiffs would, or would even be likely to, create a clear and present danger by the exercise of their First Amendment freedoms. What is the danger to our Government which the record shows would result if the union were to exercise its right to elect whatever officers it pleases; if the plaintiff officers were to entertain the proscribed beliefs or affiliations; if the plaintiff member were to exercise her right to vote for whomsoever she pleases for union office? How would the national interest be adversely affected in any way if the plaintiff union continued to represent the employees of Press Wireless, Inc., for purposes of collective bargaining?

The record here reveals no such danger. Yet each of the plaintiffs has been deprived of his rights without his day in court.

Is it not incumbent upon the Government, before limiting one's speech or affiliation, or punishing one therefor,

to establish that the particular speech or affiliation of that person, in the circumstances in which it was made, constitutes a clear and present danger? Can the rights of anyone so injured be summarily disposed of on a motion such as was made in the instant case, without a trial of the relevant facts in his case? We know of no case in the history of our law, and the Government cites none, which sustained such a principle and which punished a person for his speech or affiliation, without a determination, after full consideration of the facts, as to whether his *particular* speech or affiliation, *in the context made*, could constitute a clear and present danger.

Possibly, indeed, the reason this Court has not hitherto had occasion to consider this problem is because since the Civil War, and until a few years ago, legislatures rarely leveled their prohibitions against a named group. Normally, and properly, they define the conduct or type of speech which they find constitutes the danger, and the burden is then upon the Court to determine whether any individual made such a speech, and if in the circumstance made, it did constitute such a clear and present danger. This is not only because the theory of our law is that guilt is personal (Appellants' Principal Brief, Point II, p. 74) and because of the limitations imposed by Article I, Section 9 of the Constitution forbidding bills of attainder (Appellants' Principal Brief, Point IV, p. 82), but also because our First Amendment rights are so fundamental to our democracy that our courts permit of no broad suppressions but only necessary and limited restriction of speech which would in the particular circumstance immediately result in the clear and present danger of which this Court speaks.

We have assumed, for the purpose of the foregoing discussion, that Congress made the finding which the Government urges. In truth, however, there is no basis for the Government's contention to be found in the statute or in its legislative history. The only fact which the record reveals

is the hatred and the desire to punish which motivated Congress. But even if there had been the finding urged, "the judgment of the legislature is not unfettered", and the Court must review the basis therefor. (*Herndon v. Lowry*, 301 U. S. 242, 258). Accordingly, we turn to the evidence which the Government claims supports its contention that Congress made a finding, and that the finding had a basis in fact.

The Government submits the following in support of its contention that Congress found a clear and present danger of the substantive evil above referred to (*supra*, p. 12):

(a) The findings in Section 1 of the statute (Government's Brief, p. 18);

(b) A statement in a Committee Report that "Communists use their influence in unions . . . to promote dissension and turmoil" (Government's Brief, pp. 21-22) and a comment by Congressman Hartley to the same effect (*Ibid.*, p. 22);

(c) The comments of "numerous Congressmen" that such leaders "might" promote political strikes (Government's Brief, p. 22);

(d) A comment by Representative Kersten that Communists use labor unions to advance their doctrines (Government's Brief, p. 22);

(e) A comment by Senator McClellan that such leaders use their power to subvert the Government (Government's Brief, p. 23);

(f) Statements by Senator Morse and President Truman that Communism must be stamped out of the labor union movement (Government's Brief, p. 24); and

(g) A comment by Congressman Hartley that Section 9(h) was prompted by testimony relating to the Allis-Chalmers strike of 1940 (Government's Brief, p. 28).



The findings in Section 1 obviously refer to the various inhibitions upon union practices which were introduced into the Labor Relations Act by Section 8(b) of the Act. They first appear in S. 1126, the Senate version of the bill, which had no provision corresponding to Section 9(h), and hence could not refer to any alleged practices of Communists.

Items (c) and (d) above are mere random statements made by various Congressmen, expressing no opinion but their own; these, as well as items (b) and (e), are precisely those "opprobrious epithets" against which we were warned in the first *Carolene* case, 304 U. S. 144. Item (f) comes from two opponents of the legislation; their statements certainly are not evidence of Congressional intent.

There remains only the statement of Congressman Hartley that Section 9(h) was justified by the testimony relating to the Allis-Chalmers strike. We do not believe that one ambiguous sentence, even when spoken by the sponsor of the bill, constitutes the Congressional finding required by the clear and present danger test. Against that statement must be weighed the dozens of statements by other members of Congress cited by both appellants and appellee in their principal briefs, conclusively demonstrating that Section 9(h) was designed to punish Communists for being Communists.

The evidence relied upon by the Government to establish that such alleged findings had a basis in fact consists of the following:

(1) A report and a pamphlet issued by the House Committee on Un-American Activities<sup>4</sup> (Government's Brief, pp. 24, 32). The irresponsibility of this Committee is so notorious that we feel it unnecessary to cite extensive authority to that effect. See, for example, Gellhorn: "Report on a Report of the House Committee on Un-American Activities", 60 Harvard Law Review 1193 (1947).

<sup>4</sup> One document was issued in 1941, six years before the law was passed; the other in 1948, a year after the law was passed.



(2) A report of a sub-committee of the House Committee on Education and Labor<sup>5</sup> (Government's Brief, pp. 30, 32). This report is based on the testimony of James Carey and Dr. Joseph B. Matthews which will be discussed below.

(3) The opinions of noted political opponents of the Communist Party. Some of these statements are those of persons who are literally professional anti-Communists, i.e., persons who make their living from the dissemination of their anti-Communist views, by writing or by lecture (Gitlow, Government's Brief, p. 43; Budenz, *ibid.*, p. 26; Matthews, *ibid.*, p. 31). Others are the statements of trade union leaders engaged over some years in bitter political struggles with so-called "left-wing" groups in their respective unions (Dubinsky, *ibid.*, p. 39; AFL resolutions, *ibid.*, pp. 34-36). We submit that action involving basic questions of constitutional liberty cannot be supported upon such evidence.

(4) The opinions of Philip Murray, James Carey, Joseph Curran and Roger Baldwin (Government's Brief, pp. 30, 31, 36-39, 41, 42, 44). Murray, Carey, Curran and Baldwin apparently all believe in the doctrines enunciated by Jefferson and Holmes, that the best test of truth is its ability to get itself accepted in the competition of the marketplace of ideas. Although these men oppose the policies of the Communist Party, they equally oppose the legislation now before the Court. Murray is a plaintiff in *Inland Steel v. NLRB.*, No. 431 on the Docket of this Court; Curran was plaintiff in *NMU v. Herzog*, 334 U. S. 854. Murray and Carey are officers of the CIO which has submitted an *amicus* brief to this Court in support of the position of appellant. Baldwin is Director of the American Civil Liberties Union which has similarly submitted such a brief. The Government may think that a clear and pres-

<sup>5</sup> Published in 1948, after the passage of the law.

ent danger justifying this legislation may be deduced from the statements of Murray, Curran, Carey and Baldwin, but evidently those gentlemen most vigorously disagree. In this respect their opinions stand in support of appellants' position, not the Government's.

(5) The opinion of Harold W. Storey, an employer then engaged in a bitter strike against a union which he claimed to be Communist-led (Government's Brief, p. 27); and an excerpt from a book by Professor Philip Taft of Brown University, which states nothing beyond the patent fact that Communists do not consider their trade union as an object of "ultimate loyalty."<sup>6</sup>

(6) The experience of other countries (Government's Brief, pp. 45-48). It is sufficient answer to this "evidence" that trade union traditions on the Continent have always included the use of strikes as political weapons—regardless of the political affiliation of the trade union leader.<sup>7</sup>

The quality of the "evidence" may perhaps be seen by analyzing the material submitted to support the contention that Communists cause "political strikes". This contention was made by Mr. Budenz in his testimony before a Congressional Committee concerning the Allis-Chalmers strike of 1941. His testimony was sharply contradicted at the

<sup>6</sup> Many persons other than Communists have ultimate loyalties to organizations other than their trade unions. Would the Government contend that Section 9(h) could be extended to apply to members of the Association of Catholic Trade Unionists?

Some of these statements, such as Taft's, Dubinsky's, Carey's, Curran's, Murray's and Matthews', were made after the Act was passed, and could not have influenced Congress. Others were made as early as 1934 and 1935, and could hardly be said to relate to a "clear and present" danger. Even Budenz's and Storey's testimony was as to events in 1940.

<sup>7</sup> Perhaps foreign experience is relevant to the proposition that after legislation levelled at Communist trade union leaders comes legislation levelled at the liberties of every citizen; such, at least, was the experience of Nazi Germany, Vichy France, Fascist Italy and Fascist Spain.

hearings by other witnesses. This assertion of Mr. Budenz was repeated by Mr. Storey (who cited Mr. Budenz as authority) in the hearings, likewise by Congressman Hartley and Kersten on the floor of the House (Government's Brief, p. 27), and by the Committee on Un-American Activities (Government's Brief, p. 33). This constituted the only evidence of a political strike before Congress or to which any Congressman alluded.\* There were 42,045 strikes from 1937-1947, inclusive (21 LRRM 25 (1949)). Would a reasonable man have come to the conclusion that Communists "tend" to promote political strikes on the basis of such evidence of one alleged political strike, considering that the Government itself alleges that some twenty unions "in key industries" have Communist leadership "strongly entrenched"—during a period of years in which the Communist Party supported the foreign policy of the Administration for but a few years out of the decade involved?

These "facts" and "evidence" are submitted in support of the Government's four major conclusions, as follows:

(1) That Communists advocate their political doctrine in their trade unions;

(2) That Communist leaders of trade unions promote "strife";

(3) That such leaders "tend" to call political strikes;

---

\* The North American Aviation Company strike was so briefly touched upon by Budenz that Congress could hardly have acted upon such information.

There are a few other instances of political strikes which the Government fails to mention. In 1948, the strongly anti-Communist AFL longshoremen's union refused to load a relief ship for Yugoslavia, because the latter country was thought to be Communist. And in the same year, the equally anti-Communist Transport Workers Union struck in New York to compel the Public Service Commission to authorize a fare increase. Do these examples help to justify Section 9(h)?

(4) That such leaders would "tend" to use their power in the interests of Soviet Russia rather than the United States.

It should be noted that these very conclusions themselves clearly establish that First Amendment rights are here involved. Under the cases, none of them would justify an intrusion into the First Amendment guaranties. On the contrary, it would be difficult indeed to square a determination that such "facts" could constitute a clear and present danger justifying invasion of First Amendment freedoms with the decisions of this Court.

*Bridges v. California*, 314 U. S. 252;

*Cantwell v. Connecticut*, 310 U. S. 296;

*Terminiello v. Chicago*, 337 U. S. 1;

*DeJonge v. Oregon*, 299 U. S. 353;

*Herndon v. Lowry*, 301 U. S. 242;

*Thomas v. Collins*, 323 U. S. 516;

*Thornhill v. Alabama*, 310 U. S. 88.

We repeat that if these "facts" and this "evidence" are sufficient to admit of a finding of clear and present danger, then there is in fact no requirement of clear and present danger. If it were necessary to engage in a dispute concerning the validity of these facts, affirmative evidence is available that Communist-led unions not only do not "tend" to engage in the practices described in the Government's brief, but that they are very frequently able and effective trade union instruments which have raised living standards of their members.<sup>9</sup> But it is unnecessary to adduce such factual material beyond the example set forth in the footnote, for the "evidence" which the Government has submitted is patently invalid.

<sup>9</sup> The only International Union unquestionably led by members of the Communist Party is the International Fur and Leather Workers Union, CIO. A report of a special sub-committee of the House Committee on Education and Labor (H. Rep. No. 19, 80th Cong., 2d

Further, it must be considered, that the Government has the affirmative duty to prove that such a clear and present danger does exist, for the presumption is against it (see Appellants' Principal Brief, p. 64).

To hold that the Government has here established the existence of a "clear and present danger" would be to set a pattern by which any legislation restricting First Amendment rights might be sustained. For inevitably, feelings on political issues run high, and it is thus always possible to draw from partisan sources impassioned arguments in support of one political belief or party as against another. Arguments proclaiming the necessity and urgency of legislation to suppress or eliminate a disliked tenet or belief may readily be found on any subject of public interest. To permit such statements to satisfy the clear and present danger requirement would be to make of that requirement a chimera.

Sess.)—the very Committee which originally advocated the adoption of Section 9(h)—comes to the following conclusion, *inter alia*:

"1. There can be no question but that the International Fur and Leather Workers Union (CIO) is dominated by members of the Communist Party. \* \* \*

\* \* \* \* \*

7. The wage scales of the fur workers are as high or higher than in any other industry, and the union is largely responsible for increasing the wage rates and lowering the hours of work to their present standard."

At page 4 of this report, it is stated that "There has been but little labor-management difficulty in the dressing and dyeing segment of the industry during the past 10 years."



### POINT III

**The decisions in the *Steward*, *Summers* and *NMU* cases are inapplicable and irrelevant to this case.**

The Government has attempted to force this statute within the narrow coverage of the *Steward* (301 U. S. 548) case. But the limited principles therein enunciated cannot be so extended without ignoring or perverting the basic premises on which that case rests. Appellants' principal brief analyzed those differences to some extent, but as the Government still urges their applicability to the case at hand, we are expanding somewhat upon our argument.

The *Steward* decision stands for the simple proposition that it is not a violation of the Tenth Amendment for a state to enter into an agreement with the Federal Government whereby the former agrees to enact certain legislation in return for payments of money. Mr. Justice Cardozo in the *Steward* case made clear that such payments, while they might have constituted a "temptation", did not amount to "coercion". As he pointed out, the failure to distinguish between the two is to "plunge the law into endless difficulties". Here the failure of the Government to draw that line has indeed resulted in confusion in its argument.

For here Congress did not merely "tempt" the appellants to surrender their First Amendment rights. It sought to coerce them by depriving them of rights they have long enjoyed. (See *amicus* brief submitted by C.I.O.)

It is also important to bear in mind that the nature of the rights which the appellants are asked to yield are First Amendment rights. Legislation which calls for a surrender of such rights must rest on firmer ground and meet more stringent tests than legislation involving other constitutional rights.

Finally, we must never forget that this statute affects basic First Amendment freedoms, and that the Constitu-

tion stands as a staunch guardian of those freedoms. In the *Steward* case the objectives of Congress were unquestionably socially desirable. The denial of First Amendment rights to anyone is never socially desirable, and when such denial is permissible at all, it is only to avoid the most serious danger to our national welfare.

The Government has claimed that *In re Summers*, 325 U. S. 561, establishes the validity of the statute at hand. While we feel that that case did to some extent encroach upon our basic freedoms, we submit that the facts there differ substantially from those at bar. In that case, petitioner was merely required to take an oath as a lawyer to support the constitution of Illinois—an oath which makes no reference to and was not calculated to interfere with any beliefs, religious or otherwise. Indeed, the case specifically noted that “under our constitutional system, one could not be excluded from the practice of law or indeed from following any other calling simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish, assuming it conceivable that any state of the Union would draw such a religious line.”

The state constitution of Illinois required men of petitioner's age group to serve in the militia in time of war. The petitioner testified specifically that he would not serve in the armed forces. Therefore, on the record in that case *Summers* clearly could not have taken the required oath, and the committee in the state which passed on the matter held that he could not be admitted to practice.

This Court pointed out that the provision of the Illinois statute was a valid one and did not aim at any particular religious group or belief. Accordingly the ruling of the State of Illinois was sustained. The Court merely held that where it appears on a record that a lawyer is required to support his state constitution and its valid provisions, but would not, on his own testimony, do so, he could not in good faith take the required oath and therefore it is not

improper to refuse to permit him to practice. The oath there was not addressed to belief, but to specific conduct. The fact that such conduct might be at variance with the petitioner's religious beliefs was merely incidental, and as we pointed out in our principal brief, not all conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. *Murdock v. Pennsylvania*, 319 U. S. 105, 109. The constitutional provision and the corresponding oath in the *Summers* case was clearly not aimed to eliminate those of any specific religious belief from their calling. If it had been, the Court makes clear, it would have been unconstitutional.

The required oath in the case at bar is clearly not analogous. It calls for no support of our constitution or our laws. It is not an oath in which appellants swear to perform any acts which might validly be required of a union officer, or to refrain from performing any specific acts which might obstruct commerce, as for example political strikes. It is merely the disavowal of a particular political belief and affiliation, the holders of which Congress sought to punish. This can hardly be compared to the oath to faithfully support the constitution called for in the *Summers* case.

Further, unlike *Summers*, there was no determination made after a full hearing on all the relevant facts that appellants here could or could not in good faith take any oath which concerned any conduct or requirement of their calling.

We should like also to note that the *Summers* case placed great reliance upon the cases of *United States v. Schwimmer*, 279 U. S. 644, and *United States v. McIntosh*, 283 U. S. 605. As this Court is aware, those cases were subsequently disapproved by the decision of this Court in *In re Girouard*, 328 U. S. 61, and might serve to cast grave doubt upon the validity of the *Summers* case.

The Government in its brief (pp. 75-76) has stated that the decision of this Court in *NMU v. Herzog*, 334 U. S. 854, "is dispositive of appellants' claim that denial of the bene-

fits of the Act to unions which do not comply with conditions validly imposed by Congress invades the rights of such unions to function or the right of employees to bargain collectively through such unions". But appellants have made no such claim. On the contrary, our position is based on the very fact that the conditions contained in 9(h) are *invalidly* imposed. We do not urge, as the Government would have this Court believe, that all trade union functions are immune from legislative regulation. For example, we have not contended that the right to act as exclusive collective bargaining agent falls within the protection of the First Amendment. We have urged, however, that the right of a trade union to meet and select its own officers is protected by that Amendment.

What appellants have urged is that use of government facilities may *not* be conditioned upon surrender of the First Amendment freedoms of belief, speech or assembly. Section 9(h) (as distinguished from 9(f) and (g), which we concede to be valid regulations and which have no relation to First Amendment freedoms) requires the surrender of the freedoms of belief, speech, press and association, protected by that Amendment, and hence the legislation may not be sustained save in the presence of a "clear and present danger".\*

### CONCLUSION

**The decision of the Court below should be reversed.**

Respectfully submitted,

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\* Another instance in which the Government seeks to answer an argument, nowhere advanced by appellants is that "the classification is unreasonable and therefore invalid because employers are not required to file similar affidavits (see p. 62). But see footnote, pages 12-13, *supra*.



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IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1949**

**No. 10**

**AMERICAN COMMUNICATIONS ASSOCIATION, CIO,  
JOSEPH P. SELLY, etc., et al.,**

*Appellants,*

**v.**

**CHARLES T. DOUGLASS, individually and as Regional Director  
of the National Labor Relations Board, Second Region.**

**MEMORANDUM FILED BY APPELLANTS  
AFTER ARGUMENT**

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**MEMORANDUM FILED BY APPELLANTS  
AFTER ARGUMENT**

---

**POINT I**

**The case is not moot.**

On the argument of the appeal herein, the Court, upon being informed that the American Communications Association had recently filed the affidavits provided for in Section 9(h) of the Labor Management Relations Act of 1947, inquired whether or not this case was thereby rendered moot. Both appellants and respondent agreed that, in their opinion, it would not be. The Court thereupon requested of both parties that they submit memoranda con-

cerning the difference in appellants' status should, on the one hand, 9(h) be declared invalid and unconstitutional, or should, on the other, the case be dismissed as moot.

The appellants submit that their position would suffer materially should the second alternative be taken by this Court instead of the first. For in that event the certification of the Commercial Telegraphers Union, AFL, as the collective bargaining representative of the employees of Press Wirelless, Inc. (which certification is called into question by virtue of the instant proceeding) would remain in full force and effect. During the period of such certification, the appellant union would not only be prevented from representing the employees of the company as their collective bargaining representative, despite the fact that the employees desire to be represented by it, but, by virtue of Section 8(b)(4)(c) of the Act, it would be precluded from striking until that certification were set aside. This might take many months and indeed, in some circumstances, the better part of a year, as will be set forth below.

In such event, the certification of the Commercial Telegraphers Union can be vacated only as the result of a new proceeding instituted by the filing of a new petition for certification by the American Communications Association. In regard to such proceeding, several problems must be considered:

1. The contract between Commercial Telegraphers Union and Press Wireless, Inc. would constitute a bar to any certification being issued prior to its expiration date. That contract (the relevant portions of which are annexed to the memorandum submitted by the respondent) does not expire until March, 1950. Hence, March of 1950 would be the earliest possible date on which the said certification could be set aside.

2. It is probable that the certification would not be set aside until many months after March, 1950. The petition, upon being filed, would be processed by the Board in ac-

cordance with its routine procedures. Thus, upon the filing, an informal conference would be arranged by the Board. Unless both unions and the employer are in complete agreement as to the appropriate unit, the date of the election, its place, and all other relevant matters, and are prepared to execute an agreement for a consent election on that basis, any one of the parties is entitled to a hearing to determine the issues in dispute. It often takes several months before such a hearing can be scheduled; after it is held, the record must be forwarded to the Board for consideration and decision. After the determination by the Board (which may take months more) an election will be directed to be held. After the election further delays are frequently encountered arising out of objections to the conduct of the election. Common experience indicates that it might easily take from six months to a year from the date of the filing of the petition by American Communications Association and the final issuance of certification.<sup>1</sup>

3. The appellant union is further put to the extreme disadvantage in being required to file its petition for certification in the face of an existing contract between the company and the Commercial Telegraphers Union (executed on the authority of the invalid certification) which contract contains a union shop provision. For by virtue of this clause the employees must remain members of the Commercial Telegraphers Union as a condition of employment and they would be subjected to possible loss of their jobs

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<sup>1</sup> Recent experience of counsel for appellants in other cases pending before the Board will serve to illustrate this point. In *Matter of Bloomingdale Stores*, a petition was filed on November 21, 1948, and an election held on March 31, 1949. Objections to the election were filed and no decision has yet been made. It is not improbable that certification is still several months off. In *Matter of Metropolitan Life Insurance Company*, a petition for a unit composed of employees in the State of Connecticut was filed on February 17, 1948; and an election was held on July 29, 1949. Objections to the election have been filed, and no certification has yet been issued. In that case final certification may be at least six months away.

should they join American Communications Association now. Accordingly, the appellant union would be put in the difficult position of being unable to secure authorizations (without which the Board will not even entertain a petition) until immediately prior to the renewal date of the contract. It cannot file a petition at once, as suggested in the memorandum submitted by the respondent, because the Board will not recognize the authorizations which American Communications Association had in 1948, when the original election, out of which this proceeding arose, took place.

On the other hand, should Section 9(h) be declared unconstitutional, the invalid election heretofore held by the Board which resulted in the certification of the Commercial Telegraphers Union, would be set aside. American Communications Association would then have several alternatives open to it. First, it could disregard the Board's procedures altogether and use its economic weapon of strike. Second, it could intervene in the pending proceeding instituted by the petition of the Commercial Telegraphers Union or file a petition of its own. It may be true that as a theoretical matter many of the delays mentioned above, which follow upon the filing of a petition, might be encountered by American Communications Association even if the statute were declared unconstitutional. However, as a practical matter, the fact that American Communications Association had the legal right to strike would make it much less likely that the employer or the minority union would engage in dilatory tactics. Moreover, in securing authorizations which would be necessary for the filing of a petition, it would not encounter the obstacle of a valid union shop contract which, as is pointed out above, now stands in the way of an intensive organizing effort.

In summary then, it may be said that should this Court dismiss the action as moot, American Communications Association will have but one alternative to assert its rights, namely, it can file a petition with all of the attendant difficulties described above. Should this case be decided in



favor of American Communications Association, that union will have two alternatives, either to file a petition or to strike.

## POINT II

### The Naturalization Law vis-a-vis Section 9(h).

During the course of the argument one of the Justices commented on the similarity between the language contained in Section 9(h) and that contained in the Naturalization Law. We should like to note first that while the language used is similar, it is not identical. The relevant provision of the Naturalization Law, 8 U. S. C. 705(b)(1) reads as follows: 2

"Section 705. Belief in government and property rights.

No person shall hereafter be naturalized as a citizen of the United States—

(a) . . .

(b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches—

(1) the overthrow by force or violence of the Government of the United States or of all forms of law:

. . . . .

Clearly, the cases decided under this statute are not of assistance in considering the objections raised by the appellants to Section 9(h), on the grounds of vagueness. The word "supports", the definition of which constitutes one of the vexing problems in interpreting Section 9(h), does not appear in Section 705 at all. The term "unconstitutional" likewise does not appear in the Naturalization Law. The

<sup>2</sup> See also: 8 U. S. C. 137(c), which contains a similar provision covering classes of persons to be excluded from admission into the United States.

term "affiliated" as used in Section 705 can hardly be determinative here, as that statute, as distinguished from Section 9(h), contains a partial definition of that term which might serve as a guide.<sup>3</sup>

A second question is raised with respect to the apparent restrictions on belief, speech and assembly which are contained in Section 705. It is extremely doubtful whether any of these restrictions could be constitutionally applied to any field of legislation other than that of immigration and naturalization. As this Court has so frequently held, the granting of citizenship is a special privilege and no one may claim it as a matter of right. The conferring of citizenship is an act of grace on the part of the sovereign.

*United States v. Ginsberg*, 243 U. S. 472.

*Tutun v. United States*, 270 U. S. 568.

*Baumgartner v. United States*, 322 U. S. 665.

*United States v. Murray*, 48 F. S. 920.

Thus the courts have upheld the constitutionality of statutes excluding from naturalization members of certain races (8 U. S. C. 703). Certainly it could not be seriously contended that these cases could serve as a precedent permitting similar classification by Congress in other fields.

Dated, New York, N. Y., October 21, 1949.

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<sup>3</sup> See *Bridges v. Wixon*, 326 U. S. 135. As noted in our original brief, pp. 70, 71, even with that definition as a guide, there was infinite trouble in defining and applying the term "affiliated".

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1948**

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**No. 336**

**AMERICAN COMMUNICATIONS ASSOCIATION, C. I. O.,  
JOSEPH P. SELLY, ETC., ET AL., APPELLANTS**

**v.**

**CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL  
DIRECTOR OF THE NATIONAL LABOR RELATIONS  
BOARD, SECOND REGION**

---

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK**

---

## **BRIEF FOR APPELLEE**

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### **OPINIONS BELOW**

The opinions of the statutory three-judge court (R. 18-21) are reported at 79 F. Supp. 563.

### **JURISDICTION**

The order of the court below, denying a motion for a temporary injunction and dismissing the complaint, was entered on August 11, 1948 (R. 21-22). An appeal was allowed on August 19, 1948 (R. 23-24) and the notice of appeal was filed on August 20, 1948 (R. 24-25). This Court noted probable jurisdiction on November 8, 1948

(R. 28). The jurisdiction of this Court rests on 28 U. S. C. 1253, 2282 and 2284.

**STATUTE INVOLVED**

Section 9 (h) of the National Labor Relations Act as amended by Section 101 of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*, provides as follows:

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

Other pertinent provisions of the original National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et eq.*) and of the Labor Management Relations Act of 1947, are set forth in Appendix A, *infra*, pp. 127-143.

#### STATEMENT

On or about June 16, 1944, the National Labor Relations Board certified the American Communications Association (hereinafter referred to as A. C. A.), affiliated with the Congress of Industrial Organizations, as exclusive bargaining representative of the radio telegraph workers employed by Press Wireless in New York and California (R. 1-2). Pursuant to the certification, A. C. A. and Press Wireless entered into a series of collective bargaining contracts covering the employees in the unit (R. 2). The most recent contract was entered into on August 13, 1947. The contract provided that it shall remain in effect until August 7, 1948, and thereafter, from year to year, unless written notice of termination shall be given by either party not less than sixty days "prior to the end of the then current term." Neither party gave written notice of termination prior to June 7, 1948. (R. 2-3, 12.)

During the first week of June 1948, Commercial Telegrapher's Union (hereinafter referred to as C. T. U.), affiliated with the American Federation of Labor, filed in the office of the Second

Region, National Labor Relations Board, a petition for certification as exclusive representative of the employees of Press Wireless in the unit then represented by A. C. A. The Regional Director of the Second Region, Charles T. Douds, thereupon notified A. C. A. of the filing of the petition and of the fact that A. C. A. had been designated as an interested party in the proceeding (R. 3, 12-13). On June 16, 1948, A. C. A. was advised by the Regional Director that since the petition for certification was filed by C. T. U. prior to the automatic renewal date of the contract between A. C. A. and Press Wireless, that contract was not, under the Board's rules; a bar to a determination of representatives, and that A. C. A. was disqualified from further participation in proceedings leading to resolution of the question concerning representation raised by C. T. U. by virtue of the failure of A. C. A. to comply with the provisions of Section 9 (f), (g) and (h) of the National Labor Relations Act, as amended (R. 4, 13).

On the same date, the Regional Director approved an agreement for a consent election entered into between C. T. U. and Press Wireless, pursuant to which an election by mail ballot was to be conducted by the Regional Director among the employees in the appropriate unit to determine whether or not the employees desired to be represented by C. T. U. as exclusive bargaining repre-



sentative.<sup>1</sup> The name of A. C. A. was to be omitted from the ballot. (R. 4, 13.)

On June 21, 1948, A. C. A. filed the statements contemplated by Sections 9(f) and (g) of the Act, and thereafter requested that the Regional Director schedule a hearing on the petition which had been filed by C. T. U. and permit A. C. A. to appear on the ballot in any election scheduled pursuant to the petition. The Regional Director denied this request on the ground that A. C. A. was not in compliance with Section 9 (h). (R. 6, 14.)

On June 22, 1948, A. C. A. and Joseph P. Selly, individually and as President of A. C. A., Joseph F. Kehoe, Individually and as Secretary Treasurer of A. C. A., and Claudia Ezekiel Capaldo, a member of A. C. A. employed by Press Wireless, filed a complaint against Charles T. Douds, Individually and as Regional Director, in the District Court of the United States for the Southern District of New York. The complaint alleged, *inter alia*, that Section 9 (h) of the Act, as amended, is unconstitutional and that the conduct of the scheduled election by the Regional Director without affording A. C. A. an opportunity to participate in the proceeding or to appear on the election ballot would result in irreparable injury to A. C. A. and to the individual complainants.

<sup>1</sup> The ballots were to be mailed on July 8, 1948, and were returnable in New York on July 23, 1948 (R. 4, 13).



(R. 5-9, 13-16.)<sup>2</sup> The complaint prayed that a three-judge court be convened pursuant to Title 28, U. S. C. 380a, and that the court enjoin the defendant from conducting any election pursuant to the consent agreement between Press Wireless and C. T. U., and from conducting any election affecting the employees in the unit involved without permitting A. C. A. to appear on the ballot (R. 9-10).

On June 24, 1948, appellants' motion for injunctive relief came on for hearing before a three-judge court composed of Circuit Judge Swan and District Judges Coxe and Rifkind, together with a similar motion for injunctive relief in a case

<sup>2</sup> The complaint further alleged that the Board erred in construing the statute as authorizing exclusion of an otherwise interested non-complying union from participation in a representation proceeding which is inaugurated on petition of a rival union (R. 4-5). In the argument before the court below, the appellee contended that the question of statutory construction was not subject to judicial review in such a proceeding, citing, *inter alia*, *National Maritime Union v. Herzog*, 334 U. S. 854, in which this Court passed only upon the validity of Section 9 (f) and (g) of the Act, and, as the Board had urged in its Motion to Affirm, did not consider or pass upon the question of statutory construction (whether the Act authorized exclusion of an interested non-complying union from the ballot), which appellant had also presented for decision. The court below in this case apparently agreed with the appellee's contention because it did not consider or pass upon the question of statutory construction. Appellants did not assign as error this action of the court below, nor does it here contend that this Court has jurisdiction to pass upon the question. The discussion of the point in appellants' brief (p. 14, note 6), is predicated

involving virtually identical questions.<sup>3</sup> The appellee orally moved that the complaint in both actions be dismissed on the ground that each failed to state a claim upon which relief could be granted. (R. 17-19.)

On June 29, 1948, the court entered its opinion in the case of *Wholesale and Warehouse Workers, et al. v. Douds, etc.*, holding that the individual plaintiffs lacked standing to sue, and further holding, Judge Rifkind dissenting, that Section 9 (h) as applied in that case was constitutional and valid for the reasons stated by the United States District Court for the District of Columbia in *National Maritime Union v. Herzog*, 78 F. Supp. 146. Because appellants had failed to

however, on the assumption that this Court assumed jurisdiction and actually decided the question of statutory construction adversely to the appellant in the *N. M. U.* case. Although we believe that this interpretation of the holding in the *N. M. U.* case is erroneous, it is immaterial to any of the issues before the Court upon this appeal whether appellants' interpretation or that of the Government is correct.

It may be said at this point, however, that any suggestion that this case could or should be disposed of on grounds of statutory construction in order to avoid decision of the constitutional question must be rejected if for no other reason than the pendency of *United Steel Workers of America, C. I. O., et al. v. National Labor Relations Board*, pending on petition for certiorari, No. 431, this Term, in which the constitutional question cannot be avoided on the statutory construction grounds described in this note.

<sup>3</sup> The companion case was *Wholesale and Warehouse Workers Union, Local 65, et al. v. Douds, etc.*, Civil Action No. 46-157, in the District Court of the United States for the Southern District of New York (R. 17).

notify the Attorney General of the pendency of the action in the instant case, the court withheld entry of an order in this case pending the filing of a waiver of notice. The court stated that upon filing of such a waiver, the instant case would be disposed of in conformity with the decision in the *Wholesale and Warehouse Workers* case. (R. 20-21). On August 5, 1948, the Attorney General by letter filed with the court waived the notice required by Section 380a of the Judicial Code, and on August 11, 1948, the court entered its order granting the appellee's motion to dismiss the complaint and denying the appellants' motion for a temporary injunction (R. 21-22).

#### SUMMARY OF ARGUMENT

##### I

The restrictions upon access to Board facilities and upon receipt of benefits under the Act which are contained in Section 9 (h) were designed by Congress to guard against disruptive activities affecting commerce engaged in by labor unions for the purpose of achieving objectives alien to the purposes and policies of the Act. Congress reasonably believed that officers of labor organiza-

In the light of this holding, the Regional Director in the instant case proceeded to conduct the scheduled election among the employees of Press Wireless. The ballots were counted on July 23, 1948 and the tally of ballots showed that 95 out of 114 eligible employees voted; 79 for the C. T. U. and 16 against. The Regional Director thereupon certified C. T. U. as the exclusive representative of the employees in the unit.

tions who were Communists or were affiliated with the Party, or who believed in violent overthrow of the government, would tend to use their positions of power in unions to promote industrial conflict rather than collective bargaining; to provoke strikes for political purposes in disregard of legitimate trade union needs and objectives; and to serve the interests of Soviet Russia against those of the United States. Evidence before Congress, the experiences of prominent trade union leaders, and of other qualified persons, and events abroad, all demonstrate that Communist officers of trade unions have utilized the power of their positions for these purposes. Congress could therefore reasonably conclude as it did, that extension of the benefits and protection accorded in the Act to labor organizations led by Communists and their supporters would not tend to effectuate but would defeat the policies of the Act, and that, in view of the power of such organizations to cripple our industrial production, denial to them of such benefits and protection was necessary to insure national security.

That Congress has power to guard against the abuse of benefits which it grants for legitimate purposes by denying them to those who it has reasonable cause to believe will misuse them is not open to question. Nor can it be doubted that the fomenting of labor unrest and strikes for the purpose of hampering execution of American foreign policy, or for other political purposes unrelated

to the subject matters of collective bargaining, constitutes an economic evil which is amenable to Congressional control under the Commerce Clause. Section 9 (h), which seeks to safeguard the objectives and policies of the Act against abuse by denying its benefits to labor organizations led by Communists and their supporters is therefore clearly a valid exercise of the commerce power.

Since, as we show in Points II and III, Section 9 (h) does not impinge upon civil rights, it is sufficient that Congress could reasonably believe the Section necessary to the accomplishment of a legitimate objective under the commerce power. But in any event, the substantive evils resulting from Communist control over labor organizations are so serious, and the imminence of their occurrence so clear, that steps taken by Congress to remove Communists from positions of power in labor organizations would clearly be proper even if such steps could be deemed to encroach upon civil rights and the "clear and present danger" test were therefore applicable. That test permits restriction upon the exercise of civil rights wherever, as here, such exercise threatens imminently to result in a serious evil which Congress is empowered to prevent.

The provisions of Section 9 (h) constituted a reasonable and appropriate means of assuring that the benefits and facilities of the Act shall not be extended to labor organizations led by Communists



or their supporters, or persons who advocated violent overthrow of government. Congress could rationally conclude, as it did, that such officers were more likely than others to utilize the powers of union office for purposes inimical to the policies of the Act. Since the means used are reasonable it is immaterial that other methods might also have been available.

## II

Denial of access to Board facilities to labor organizations where officers do not comply with Section 9 (h) does not deny to such organizations any constitutional rights. Certainly, Congress was not required by the Constitution to enact the National Labor Relations Act, and the rights under that Act are no more immune from legislative control than other rights created by statute. While complying organizations which have access to Board facilities are placed in a more advantageous position to compete for employee support, non-complying unions are not, by that token, either in fact or in law denied the right to function. The power to determine whether to be represented by a complying or non-complying union is left by the statute in the hands of the employees themselves. Congress is empowered to achieve legitimate objectives under the Commerce Clause by offering inducements to employees to select as bargaining agents those labor organizations which cooperate in the attainment of such objectives rather than those which do not. Even

assuming that Congress could not directly compel such choice, since the inducement is offered for a legitimate national purpose and does not coerce employees, it "does not go beyond the bounds of power." *Steward Machine Co. v. Davis*, 301 U. S. 548, 591. The decision of this Court in *National Maritime Union v. Herzog*, 334 U. S. 854, is dispositive of appellant's claim that denial of the benefits of the Act to unions which do not comply with conditions validly imposed by Congress invades the right of such unions to function or the right of employees to bargain collectively through such unions.

Section 9 (h) likewise does not coerce labor organizations to select as officers persons who will file the affidavits rather than those who will not. It therefore does not encroach upon the right of union members to select their own officers or upon the right of any person to seek to become or remain a union officer. To the extent that the statute, by its offer of benefits, induces union members to select officers who qualify under Section 9 (h), the inducement is justified by the legitimate purpose of Congress to promote the objectives of the Act and safeguard national security.

### III

Appellants' contention that Section 9 (h) must be tested by the clear and present danger rule because the Section invades the rights of union leaders to freedom of speech, and to freedom of

political belief and affiliation is unsound. Section 9 (h) does not prevent any labor leader from being a Communist, supporting Communist organizations by speech or writing, or believing in violent overthrow of government. For this reason the cases cited by appellants which hold that governmental restrictions upon speech, religious belief, publication or political association must be justified under the clear and present danger rule are inapplicable.

Even if it be assumed, contrary to the facts, that the statute denies to Communists, supporters of Communism, and advocates of violent overthrow of government, the right to hold office in a labor union, the statute could not be deemed a regulation of speech, press or assembly. It would still be no more than a regulation of the occupation of labor union office and, as such, is to be judged on the "reasonable basis" standard. For the right to hold office in a labor union seeking the benefits provided by law, like the right to engage in other occupations affecting the public interest, is subject to reasonable regulation.

Appellants' contention that the statute violates the First Amendment because the classification made in Section 9 (h) refers to political affiliation and belief ignores the fact that the affiliation and belief referred to have a direct bearing upon the manner in which, and the objectives for which, a union officer will utilize the powers of his position. The Communist Party, unlike other

political parties, notoriously seeks to attain its objectives not merely through constitutionally practiced political activities, but also, *inter alia*, particularly through the control of labor unions and the perpetration of strikes. It is thus much more than a political party, and it is the peculiar nature of the organization which justifies this legislation. The type of activity by the Party and its members or supporters who occupy office in labor unions, especially when it serves interests hostile to the United States, constitutes a proper subject for the exercise of legislative power.

Neither membership in the Communist Party nor belief in violent overthrow of the government are, as such, targets of the statute. The target is potential *conduct* which stems from such membership or belief. And the statute does not regulate the belief, but *conduct*—the holding of a union office. Where, as here, it is the possession of the beliefs which lead individuals to engage in the activities deemed to be harmful, classification of conduct to be regulated in terms of belief or affiliation is not condemned by the Constitution.

The proposition that belief or affiliation may properly be deemed to give rise to an inference concerning future conduct is illustrated by the decisions of this Court in *In re Summers*, 325 U. S. 561; *Hirabayashi v. United States*, 320 U. S. 81, and *Korematsu v. United States*, 323 U. S. 214. And many cases hold that when factors such as

belief, political affiliation, race and the like are used as a basis for legislative classification, validity is to be tested not by the "clear and present danger" rule, but in terms of whether the factor used has a reasonable relation to the particular legitimate object of the legislation. Among the most recent of these is *United Public Workers v. Mitchell*, 330 U. S. 75, where denial of government employment to persons who exercised their constitutional right to engage in political activity was upheld on the ground that Congress could reasonably consider such activity detrimental to the public service.

The cases cited by appellants to establish that government is without power to deny, on the basis of belief or affiliation, the use of facilities established by government for the purpose of assisting the dissemination of information are not in point, for the facilities and benefits of the Act were created by Congress not to facilitate the dissemination of information, but to promote collective bargaining and industrial peace.

Section 9 (h) is clearly not an attempt to prescribe orthodoxy of political views. The affidavit provision of the Act cannot, therefore, be assimilated to the "test oaths" utilized historically as a means of suppressing heretical religious beliefs. The mere requirement that one take a qualifying oath respecting one's views is not proscribed by the Constitution and is not itself an evil.



Since proper basis exists to support the classification made in Section 9 (h), congressional prejudice, real or alleged, cannot constitute an excuse for its invalidation. Cf. *Sonzinsky v. United States*, 300 U. S. 506, 513-514.

#### IV

Section 9 (h) is not unconstitutionally indefinite. The particular phrases appellants attack are words of generally understood meaning, although there will, of course, be a question as to their application to border-line situations. The fact that there will be doubtful cases does not render a statute unconstitutionally indefinite, when there is a hard core of circumstances as to which the ordinary person would have no doubt as to its application. Furthermore, the present statute can only be violated by a wilful offender; it establishes a subjective test. This requirement of wilfulness relieves the statute of the objection that it punishes without warning an offense of which the accused was unaware. In no case in which *scienter* was an element of the offense has the Court held a statute invalid for indefiniteness. This is true even as to statutes operating in the field of First Amendment rights, as *Winters v. New York*, 333 U. S. 507, suggests. But in any event, for reasons already stated, this statute does not impinge upon First Amendment freedoms and thus is not subject to the higher standard of definiteness.

Section 9 (h) is not a bill of attainder. It imposes no punishment, and does not even impose qualifications for union office, but only reasonable conditions upon a union's right to the benefits accorded by the National Labor Relations Act. But even assuming that it can be construed as denying the right to hold union office, it is not a bill of attainder but merely a lawful prescription of qualifications for persons undertaking a fiduciary responsibility affecting the public interest. Many cases establish the legislative power to impose qualifying requirements on persons seeking to engage in particular occupations.

### ARGUMENT

#### I

#### SECTION 9 (H) IS A REASONABLE AND VALID EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

A. BY ENACTING SECTION 9 (H), CONGRESS SOUGHT TO EFFECTUATE THE NATIONAL POLICY DECLARED IN THE ORIGINAL NATIONAL LABOR RELATIONS ACT

The purpose of Congress in enacting the original National Labor Relations Act in 1935 (49 Stat. 449, 29 U. S. C. 15, *et seq.*) was to reduce interruptions to commerce caused by strikes. That Act declared it to be (Section 1):

*the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and*

*to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. [Italics supplied.]*

The elimination of the causes of obstructions to the free flow of commerce was not only the Congressional purpose and policy; but it was, in addition, the constitutional justification for the regulatory provisions of the *Wagner Act. National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1.

In amending the National Labor Relations Act by enacting Section 9 (h), the congressional purpose was the same. And, in our view, that provision has the same constitutional justification. Indeed, in amending the Act, Congress incorporated into Section 1 the following finding:

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the

public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

The Labor Management Relations Act of 1947 thus included provisions designed to eliminate practices obstructive of commerce and inconsistent with the statutory policy by denying the benefits of the Act to certain employees or labor organizations. To guard against the dangers of divided allegiance, Congress denied the benefits of the statute to labor organizations composed of supervisors (Sections 2 (3), 2 (11), 14 (a)), and to labor organizations composed of rank and file workers when they seek to represent plant guards (Section 9 (b) (3)). To "protect the rights of individual employees in their relations with labor organizations whose activities affect commerce" (Section 1 (b)), Congress, in Sections 9 (f) and (g), provided for denial of the benefits of the Act to labor organizations which failed to file and disclose to union members specified financial and structural reports and information.

This latter requirement, that labor organizations which desire to use the benefits of the Act file and make available to union members information relevant to the functioning of such organizations and to the obligations and privileges of membership, was sustained by this Court in *National Maritime Union v. Herzog*, 334 U. S. 851. Its provisions were designed to assist the intelligent

exercise by union members of the public rights which the statute undertook to protect. As such, they were clearly a valid exercise of Congressional power under the Commerce Clause.

The provisions of Section 9 (h) are part of a pattern of restrictions imposed by Congress upon its grant of the benefits of the Act for the purpose of guarding against misuse of those benefits and frustration of the legitimate objectives of the statute. Section 9 (h) was the product of the determination by Congress that certain practices of labor organizations whose officers were members of or supporters of the Communist party, or who believed in or supported organizations which advocated violent overthrow of the Government, were inimical to the purposes for which the protection of the statute was granted. Congress determined that extension of the benefits of the Act to such labor organizations would not serve to promote the policies of the Act, and might endanger national security interests. As we shall demonstrate, Congress believed that Communists and their supporters do not view labor unions primarily as instrumentalities for the improvement of the economic position of employees vis-a-vis their employers, but rather as weapons in a struggle to achieve political ends, detrimental to the liberties, privileges and immunities of the people. Congress further believed that Communists and their supporters, and persons who ad-



vocate violent overthrow of the government, when they attain positions of power and leadership in a labor union, would be likely not to practice collective bargaining as a method of "friendly adjustment" of employer-employee disputes, but instead as a vehicle for promoting strife between employers and employees. Congress also believed that Communists and their supporters, and persons who advocate violent overthrow of the government, if in control of labor organizations, would be prone to provoke strikes disruptive of interstate commerce, not for the purpose of improving the economic lot of union members, but for political purposes. And finally, Congress believed that officers of labor organizations who are Communists, or supporters of Communism, would be likely, in periods of national emergency, to utilize their power within such organizations to call and promote strikes contrary to the interests of our government, if those interests happened to be opposed to the interests of a foreign power, Soviet Russia.

B. CONGRESS REASONABLY BELIEVED THAT THE POLICIES OF THE ACT AND THE SECURITY INTERESTS OF THE NATION WOULD NOT BE POSTERED BY EXTENSION OF THE BENEFITS OF THE ACT TO LABOR ORGANIZATIONS WHOSE OFFICERS ARE COMMUNISTS OR SUPPORTERS OF ORGANIZATIONS DOMINATED BY COMMUNISTS

In its report recommending enactment of a predecessor provision to Section 9 (h), the House Committee on Education and Labor stated (H. Rep. No. 245, 80th Cong., 1st Sess., p. 39): "Communists use their influence in unions not to benefit

workers, but to promote dissension and turmoil." Congressman Hartley, manager of the bill in the House, urged that the benefits of the Act should be limited to labor organizations whose leaders were "devoted to honest trade unionism and not class warfare and turmoil." (93 Cong. Rec. 3425).

Numerous Congressmen, during the course of debate, indicated their belief that, in periods of national emergency, Communist leaders of trade unions might promote strikes for the purpose of undermining the ability of the Government to effectuate its policies (93 Cong. Rec. 3626-3634). Representative Kersten pointed out (93 Cong. Rec. 3519): "We know that it is the purpose of the Communist Party to use the labor union as a tool to bring about the spread of their antihuman doctrine."

In the Senate, Senator McClellan, sponsor of Section 9 (h), stated (93 Cong. Rec. 4894):

\* \* \* a small minority of Communists are able to infiltrate into these organizations, and by the processes under which they operate they are able to rise, and they have risen, in some unions to official positions. \* \* \* If they rise to positions of power as officers in labor organizations, then, with the law that we enact, investing certain powers in labor organizations, such as the power of collective bargaining, and other powers and rights that we have legislated and invested in them, we are simply placing the power and authority and the

sanction of law behind men who are in those positions, giving them authority to bargain collectively, to deal with management of industry, and thus wield a greater influence in the economic and political life of the Nation. We are simply giving authority to people who are not loyal to our Government, who will use that power as Communists have demonstrated in the past they will use it, for the purpose of subversive work and for undermining the very fundamentals upon which this Government rests.

The opponents of the measure attacked it not because its objective was improper, but because they did not believe that the means selected for coping with the danger were wise. For example, Senator Morse stated (93 Cong. Rec. 5109): "I need not reiterate my opposition to Communists and their beliefs. I shall fight communism with all my energy because it destroys the liberties of freemen. I want to say that communism must be stamped out of the free labor movement of this country, if we are to preserve the rights of free workers and protect the dignity of the individual." President Truman, in his veto message stated (93 Cong. Rec. 7488): "Congress intended to assist labor organizations to rid themselves of Communist officers. With this objective I am in full accord." The President opposed the provisions of Section 9 (h) on the ground that the method therein adopted to achieve this objective would in itself tend to promote strikes, since

labor organizations denied access to Board facilities because one or more of their officers refused to file the affidavit would be compelled to strike to secure redress against employer unfair labor practices.

The conclusions of Congress, that Communist leaders of labor organizations might utilize the privileges accorded by the Act to foster policies ~~other than the~~ collective bargaining favored by Congress, derived from the personal experience and observation of the legislators and from testimony before the House and Senate Committees which considered the bill, and they comport with the conclusions reached by other Committees of Congress, with the judgment of many trade union leaders and numerous experts in the field of industrial relations, and with the experience of countries where the Communists have gained substantial control of labor unions. Much of that supporting evidence is spelled out in the majority opinion in *National Maritime Union v. Herzog*, 78 F. Supp. 146, 168-171, 175-176, affirmed, 334 U. S. 854. We here set it forth.

### 1. *The evidence compiled by the Committees of Congress*

In 1941, the House Committee on Un-American Activities stated in its report (H. Rep. No. 1, 77th Cong., 1st Sess., pp. 9-10):<sup>5</sup>

<sup>5</sup> See, also, H. Rep. No. 2, 76th Cong., 1st Sess., pp. 46-64 (1939), describing Communist penetration of labor union.

The evidence (which the committee has gathered bears abundant testimony to the fact that throughout the years there has been a major purpose of the Communist Party to attempt to bore from within the ranks of the American labor (sic) in an effort either to turn labor organizations into its political tools or to disrupt and destroy them. \* \* \*

It is of basic importance to understand the exactly opposite purposes of the American labor movement on the one hand and the Communist Party on the other. The aims of the American labor movement are to improve the conditions of the American workers and over a period of time to secure for them a better and fuller life and a place of partnership in the industrial life of the United States. The purposes of the Communists on the other hand are in the words of Stalin to make the unions a school of communism, to increase in every possible way the antagonism between wage earners and other sections of the population and to prostitute the labor movement for the use of the party in carrying out various of its international plans even if in so doing the welfare of the particular group of workers in question may suffer as a consequence. Hence, wherever Communists have gained a foothold in the labor movement they have sought by every means at their command to remove from office any leader however devoted to the welfare of the rank and file workers he might be who



has refused to cooperate with the party line.

We find that the program of the Communist Party calls for determined opposition to the national-defense program and for a concentration of efforts in basic and war industries. The committee's records show that from the Communist standpoint the main purpose of a strike is political and in order to further in some way or another the program of Moscow. Clearly, this could be served by the bringing about and prolonging of strikes in defense industries. Thus we see again how diametrically opposite are the aims and purposes of the American labor movement on the one hand and the Communist Party on the other.

The House Committee which considered Section 9 (h) heard Louis Budenz, onetime managing editor of the official Communist newspaper, The Daily Worker, and former member of the National Committee of the Communist Party, testify that, to his knowledge, a strike which occurred in 1941 at the Milwaukee plant of the Allis-Chalmers Company, had been deliberately precipitated and provoked by the Communist officers of the local union at that plant as a result of instructions delivered to those officers by the Political Committee of the Communist Party; and that the purpose of the strike was not to improve the economic position of the employees

but to impede the American program of giving aid to Britain, and thereby to assist the effectuation of the foreign policy of the Soviet Union.\* Mr. Budenz further testified that Communist leadership during this period, had, for the same reason, precipitated a strike at the North American Aviation Company.† The effect of the strike at the Allis-Chalmers plant on the defense program was related to the House Committee by Mr. Storey, Vice President of the Company. He testified that the strike, lasting 76 days, held up for that period delivery of power units (turbogenerators) "to a plant that the Government wanted to build to make powder during the wartime."‡

On the floor of the House, Congressman Kersten summarized Mr. Budenz' testimony concerning the Allis-Chalmers strike, as an example of the dangers of vesting additional power in the hands of labor leaders who are Communists or supporters of the party. He said (93 Cong. Rec. 3519):

One example of Communist tactics that came to the attention of our committee \* \* \* is the example testified to

\* Hearings before the House Committee on Education and Labor on bills to amend the National Labor Relations Act, 80th Cong., 1st Sess., pp. 3603-3623. See also, pp. 1380-1487, 1973-2142. Compare Hearings before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., on S. 55 and S. J. Res. 22, pp. 819-873.

† House Hearings, *op. cit.* n. 6, pp. 1384-1385.

‡ *Ibid.*, p. 1385.

by Mr. Louis Budenz, former editor of the Communist Daily Worker. Budenz testified that the Communist Party Political Committee in New York decided in the year 1940 that a strike should be called in the Allis-Chalmers Co., of Milwaukee, because they were one of the few firms making steel turbines for United States destroyers and that by pulling the strike in that plant they could bring about a following of the party line at that time of opposing aid to Britain. That was before Hitler attacked Russia. Budenz testified as to traveling to Milwaukee and meeting in secret with Mr. Eugene Dennis, present secretary of the Communist Party and with Mr. Harold Christoffel, the Communist Party member and president of the Allis-Chalmers local, at which secret meeting it was decided to strike the plant pursuant to the decision in New York of the Communist Party. \* \* \* It was later determined by the Milwaukee courts that over 2,000 of the strike ballots were fraudulently stuffed into the boxes. That the Communist Party, as agents of a foreign government, should be able to cause a strike in an American plant is horrifying. \* \* \*

Congressman Hartley stated to the House (93 Cong. Rec. 3424), that "If anyone doubts the need of [Section 9 (h)] all you have to do is to read the testimony taken by our subcommittee in connection with the Allis-Chalmers strike in Mil-

waukee and you will understand that section of the bill is most in order."\*

Congress was not unaware that Communist officers of labor organizations sometimes seem effectively to represent the economic interest of members in collective bargaining, and in grievance adjustment. But Congress believed that whatever public value Communist leadership of labor unions might have in this respect was clearly and overwhelmingly outweighed by the fact that their objective is to utilize their power and influence for purposes inimical to the policies of the Act and to national security. Mr. Storey testified that (House Hearings, *supra*, pp. 1392-1393):

the Communists cleverly intertwine grievances, we will say real grievances, imagined grievances, and then they make up grievances to cause unrest. So that they appear to be carrying on good trade-union practices at times. They delude the workers and \* \* \* that is one of the reasons that our workers do not appreciate the menace of communism, because they seem to be working for the benefit of the workers in a trade-union area.

Congressman Kersten stated to the House (93 Cong. Rec. 3519):

\* \* \* in times past, Communists and their fellow travelers made a specialty of

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\* See also, Hartley, *Our New National Labor Policy* (Funk & Wagnalls Co., 1948), pp. 40, 179.

studying trade unionism and the technique of the union hall. They became experts in the knowledge of trade-union matters so much so that many good American workers have been willing to place their fate in the hands of party-line officers only to find that they became the dupes of Communist tactics. \* \* \*

The foregoing evidence with respect to the practices and objectives of Communists and their supporters, who attain positions of power and leadership in labor unions, is confirmed and augmented by the recent "Investigation of Communist Infiltration of <sup>UEMWA</sup> ~~Vermwa~~", conducted by a subcommittee of the House Committee on Education and Labor.

This subcommittee heard Mr. James B. Carey, Secretary-Treasurer of the C. I. O., and former president of the United Electrical, Radio and Machine Workers of America, C. I. O., testify that "the present president, the secretary-treasurer, the organizational director, and the executive board" of the UE sacrificed "the interests of the UE to promote the foreign policy of the Soviet Union"; and that "side by side with this attempted advancement of Soviet policy has gone a destruction of the democratic processes within the union", for candidates for union office have been supported, "not on the basis of merit or ability as union men, but because of their willingness to accept orders from the Communist Party to con-



trol the UE."<sup>10</sup> The subcommittee also heard Dr. Joseph B. Matthews, formerly director of research for the House Un-American Activities Committee, demonstrate, by a comparison of the publications of the UE and those of the Communist Party and its front organizations, over the past ten years, that the UE "toes the Kremlin line on all questions". Dr. Matthews further described how half a dozen Communist Party members, who were employed in the vital General Electric Plant at Schenectady, N. Y., forged several thousand union cards and dues receipts, and thereby obtained control of UE Local 304 at that plant.<sup>11</sup>

On the basis of the testimony of these and numerous other witnesses, the subcommittee issued, on December 14, 1948, an Interim Report, finding that (H. Committee Rep. No. 15 80th Cong., 2nd Sess., p. 19):

The Communist Party seeks sources of power that can paralyze America. It has gained a strong foothold in one of the Nation's most strategic industries: the electrical industry. It dominates the largest labor union in that industry: The United Electrical, Radio and Machine Workers of America. It has seized control of its na-

<sup>10</sup> Hearings before a Special Subcommittee of the House Committee on Education and Labor, 80th Cong., 2d Sess., pursuant to H. Res. 111, pp. 43-45.

<sup>11</sup> Hearings, *op. cit.* n. 10, pp. 167, 169-172; see also, pp. 213-215, 353-354.

tional office, the executive board, the paid staff, the union newspapers, and a number of its district councils and locals. \* \* \*

Many of the products of the industry with which the union has contracts relate to national defense. They are; Radar, jet propulsion, signalling devices, electrical instruments for airplanes and submarines and the machinery to make atomic energy. \* \* \*

The above facts taken together constitute a serious threat to the security of the United States.

\* \* \* \* \*

The hold of the Communists on America's electrical industry is the hold of Soviet Russia. It is Communism in action—now. It is not an historical; it is a present danger.

The subcommittee's conclusion that Communist control of labor organizations in strategic industries is "a present danger" to the country's security was iterated by the House Committee on Un-American Activities, in a new pamphlet entitled "100 Things You Should Know About Communism and Labor" (Gov't Print. Off., 1948). This pamphlet, which is based upon the extensive hearings held by that Committee on Communist activity in America, points out (p. 10) that Communists join unions specifically for the purpose of making them "schools of Communism," and that, in case of conflict between the union's interest and Communist Party orders, the "Communist Party comes first." The pamphlet then

lists (pp. 14-15) some twenty unions in key industries, including appellant American Communications Association, which have "Communist leadership strongly entrenched." With this background, the pamphlet continues (pp. 15-16):

*74. What would Communists do in the event of war between the United States and the Soviet Union?*

They say themselves they would "stop the manufacture and transport of munitions," as well as "the transport of all other materials essential to the conduct of war through mass demonstrations, picketing, and strikes." They would try to "stall the (American) war machine in its tracks."

*75. Have the Communists ever carried out such a policy in the United States?*

Yes, during the Stalin-Hitler pact (1939-1941) they caused terrible strikes that delayed U. S. rearmament. For example, Allis-Chalmers, Milwaukee; International Harvester, Harvil plant in Los Angeles; Vultee Aircraft, North American Aviation, Los Angeles; Aluminum Co. of America, Cleveland; the Mine, Mill and Smelter Workers at Trona, Calif., and in Connecticut brass factories, all were led by the Communists.

*76. What could the above cited American Communications Association do in case of war?*

This outfit is in our cable offices and in the radio control rooms of our merchant ships and commercial airfields. They could

garble messages so as to sink ships, wreck planes, tap intelligence channels, and isolate us from the rest of the world.

Referring again to the appellant American Communications Association, the pamphlet states (p. 17) that, during the period of the Stalin-Hitler Pact Joseph Selby, president of the union, "led a movement against U. S. armaments, saying 'Don't give us any baloney about "patriotism" and "national defense".' "

## *2. The experiences of prominent labor leaders*

The conclusions of the Congressional committees are confirmed by the experiences of prominent leaders of national labor organizations who have had closer contact with the problem; both join to demonstrate that diversity exists between the economic goals of trade-union activity which Congress seeks to foster and protect in the Act, and the political objectives toward which Communist leaders of trade-unions seek to orient their organizations.

In 1934, the Fifty-Fourth Annual Convention of the American Federation of Labor adopted a resolution relating to Communist infiltration into labor unions which read, in part, as follows:

Members of the Communist Party have endeavored to bore within the trade-union movement and establish so-called cells within local unions for the purpose of destroying the trade-union movement by making it a part of the Communist politi-

cal party so that the purposes and the method of applying the objectives of the Communist Party could be put into operation in the industrial field.<sup>12</sup>

In its Fifty-Fifth Convention, the Executive Council of the Federation adopted a report declaring that Communists "are not acting in the unions as trade-unionists; but rather as Communists. Instead of being loyal to their unions, they are loyal to their party."<sup>13</sup>

In the Fifty-Ninth Convention, in 1939, the Federation adopted a resolution recommending that Communists be excluded from membership in unions affiliated with the American Federation of Labor. The resolution declared in part: "

It is the openly avowed and clearly stated purpose of the Communist Party to obtain control of labor unions in order first, to use them as recruiting grounds for more members and followers; secondly, to use them in order to spread inflammatory propaganda and so influence the great mass of workers;

<sup>12</sup> Committee Report, Resolution No. 201—by Delegate Paul Porter, Radio Factory Workers Union, Federal Labor Union No. 18609, in Report of the Proceedings of the Fifty-Fourth Annual Convention of the American Federation of Labor, Judd & Detweiler, Washington, D. C., 1934, p. 557.

<sup>13</sup> Report of the Proceedings of the Fifty-Fifth Annual Convention of the American Federation of Labor, Judd & Detweiler, Washington, D. C., 1935, p. 832.

<sup>14</sup> Resolution No. 83 in Report of the Proceedings of the Fifty-Ninth Annual Convention of the American Federation of Labor, Judd & Detweiler, Washington, D. C., 1939, pp. 492, 505.



and thirdly, to use them to create strikes and make impractical demands in order to disrupt industry and then to seize it for the social revolution;

\* \* \*

Communist agitators, working under definite instructions from the organized Communist Party, are constantly endeavoring to "bore from within" in every union, to the end that they may obtain positions of influence and control and so lead the workers along the road to Communism; and

In every instance where Communist-led groups have obtained any measure of such control in labor unions they have led the workers into strikes and industrial conflict, not for the legitimate purpose of bettering conditions, improving wages or hours, or defending the workers from attack, but for the radical purpose of developing class conflict, and for the purpose of creating situations which they could use for the spread of Communist propaganda;

\* \* \*

These Communist leaders in their efforts to promote class warfare, and ignoring the legitimate purpose of labor unions and the legitimate interests of the workers, have disrupted unions, divided the workers into warring camps, crippled industrial production, and caused loss of jobs and wages to the mass of the workers \* \* \*

Impressive in this regard also is the experience of Joseph Curran, president of the National

Maritime Union (C. I. O.). Writing in the "Pilot," official newspaper of the N. M. U., President Curran recounted the efforts of Communists within the union during the period of hostilities between Germany and Russia, to force upon the union a policy of collaboration with employers and total abandonment of strikes, whatever the cost of such a policy to the economic interests of the union members. He pointed out, however, that since the end of the war, shortly after relations between the United States and Russia began to deteriorate, the Communists did their utmost to preclude the establishment of amicable relations and to provoke hostility between employers in the industry and the union. On both occasions, Curran pointed out, the policy advocated by the Communists in the union was "the policy of the Communist Party."<sup>15</sup> In the columns of the "Pilot" for October 10, 1947, Curran exposed the efforts of the Communists in the N. M. U. to gain control of the union convention. He said in part: "Any rank and filers who thought that this was a simple fight between officials for power can now see by the action of the Communists at this convention that it is not. It is a fight by the Communists to either control our Union or destroy it. Nothing less."<sup>16</sup> President Curran repeated this observation on October 24,

<sup>15</sup> N. M. U. "Pilot," September 12, 1947, page 2, cols. 3-4.

<sup>16</sup> "Pilot," page 2, cols. 2-3.

1947, in a column in which he also said: "They [Communist delegates] came to the convention fully instructed and with a program directed by the highest chiefs in the Communist Party.

\* \* \* These party delegates [who voted contrary to the instructions of their union constituencies] proved beyond a shadow of a doubt that they represented NOT the membership of the NMU, but belonged body and soul to the Communist Party."<sup>17</sup> In a column appearing on November 7, 1947, Curran pointed out that by virtue of Communist control, "Instead of laying stress on the needs for jobs for our members and internal problems of our Union, the greatest space in the Pilot is devoted to the material that the Communist Party is pushing."<sup>18</sup> On November 21, 1947, Curran disclosed in his column that Communist leaders within the union, after their defeat in the convention, had undertaken to destroy the union, by promoting unnecessary strikes and by refusing to settle grievances amicably with employers.<sup>19</sup> And, on September 3, 1948, a Trial Committee of the N. M. U. found that three officials of the union, Ferdinand C. Smith, Howard McKenzie and Paul Palazzi, "subordinated the best interests of the Union and its members to the improper purposes of the Communist Party of

<sup>17</sup> "Pilot," October 24, 1947, p. 2, col. 2.

<sup>18</sup> "Pilot," p. 2, col. 2.

<sup>19</sup> "Pilot," p. 2, cols. 2-3; p. 9, col. 4.

America, which they served at the expense of the Union and its members and to the exclusion of the legitimate activities and purposes of the N. M. U.”<sup>20</sup>

In an article appearing in the New York Times on May 11, 1947, David Dubinsky, President of the International Ladies Garment Workers Union (A. F. of L.), recounted the experience of that union in 1926, when, for a short period, the New York locals of that organization were subject to Communist leadership. These leaders, he stated,<sup>21</sup> “succeeded in plunging the coat and suit industry into a general strike. After a futile eight-week struggle the local Communist leaders had had enough. They were ready to come to a settlement, but the Communist Party, feeling that the Moscow line was about to change, ordered their agents inside the union to continue the strike—against their better judgment and against the interest of the workers. \* \* \* It took ten years for us to recover from the criminal and stupid Communist-led strike of 1926 which cost \$3,500,000 and left in its wake a chaotic industry and a crippled union.” In the same article he explained.<sup>22</sup>

The workers organizations are the largest and most vital nongovernmental body

<sup>20</sup> “Pilot,” September 3, 1948, pp. 10-11.

<sup>21</sup> Part VI, p. 11.

<sup>22</sup> *Ibid.*, p. 7.

in the community. They are primarily dedicated to improving working conditions, to raising living standards. They are part of a delicate mechanism of modern life, the core of "human engineering." The influence of organized labor reaches far beyond its 13,000,000 members or their families.

For this reason the significance of Communist operations in trade unions can scarcely be exaggerated. Like termites, they bore into the "house of labor," but are not an integral part of the structure because the spirit and aims of totalitarian communism are totally distinct from and hostile to the ideals and policies of trade unionism.

In February 1945, while the Retail, Wholesale and Warehouse Employees Union (C. I. O.) was engaged in a strike provoked by the recalcitrant refusal of Montgomery Ward & Co. to bargain collectively with that Union, or to accede to directives of the National War Labor Board, locals of that Union, which were under Communist leadership, castigated the leadership of the national union severely for having undertaken the strike. The official union publication that month carried an article demonstrating that these attacks upon the national leadership of the union were a betrayal of the Union's interests, and were dictated only by adherence to the Communist Party "line" which, during that period, denounced all



strikes, and completely subordinated all legitimate trade-union interests to the need for continued production while the United States and Russia were allies in the war.<sup>23</sup>

The experience of the United Steel Workers of America (C. I. O.) with the activities of Communists and their supporters has been no different. President Philip Murray warned the Fourth Constitutional Convention of the union, which met at Boston in May, 1948, that "the Communists here in the United States will, if it serves their best purposes tomorrow, destroy this labor union, if by so doing they are following the line from Moscow."<sup>24</sup> At the May 14 session of the convention, the delegates overwhelmingly adopted an amendment to the union constitution which bars anyone, "who is a member, consistent supporter, or who actively participates in the activities of the Communist Party," from holding "any office or position," or from serving on any committee, "in the International Union or a local union."<sup>25</sup>

Mr. Murray repeated his attack on the activities of Communists in labor unions at the Tenth Constitutional Convention of the C. I. O., which was held in Portland, Oregon, in No-

<sup>23</sup> The Retail, Wholesale and Department Store Employee, February, 1945, pp. 5, 14. See also, Levenstein, *Labor Today and Tomorrow* (Knopf, 1945), pp. 165-169.

<sup>24</sup> "Steel Labor," June 1948, p. 3, col. 1.

<sup>25</sup> *Ibid.*, p. 2.

November, 1948. At the November 23 session, he stated:<sup>26</sup>

Their line never changes—that is to say, the line changes, yes, but their policy with reference to adherence to the Soviet line never changes. \* \* \* They content themselves with a general castigation of their own government and the policies of their own government. They are conducting a cold war, and they are attempting to use this vehicle, this instrument, this organization as a means for the furtherance of their cold war propaganda.

And, at the November 26 meeting, he added:<sup>27</sup>

\* \* \* under no circumstances am I going to permit \* \* \* Communistic infiltration into the National C. I. O. movement. I make that statement with sincere convictions based upon a knowledge that has come to me down through the years, of the damaging effects, the devastating effects, the degrading effects that special outside interests, particularly the Communist party, may have upon the labor movement in the United States of America.

### 3 *The views of other qualified persons*

Spokesmen for the Communist Party, former Communist Party officials, and students in the field of labor relations agree that Communist

<sup>26</sup> Daily Proceedings of the Tenth Constitutional Convention of the Congress of Industrial Organizations, Tuesday, November 23, 1948, p. 53.

<sup>27</sup> *Ibid.*, Friday, November 26, 1948, p. 12.

leaders of labor organizations utilize trade-unions not primarily as instruments for advancing the economic welfare of workers through the process of collective bargaining, but rather as weapons of class warfare for the advancement of political objectives.<sup>25</sup> In his book, *I Confess*, Benjamin Gitlow, formerly a prominent Communist, stated as follows:

In the Communist movement, control is a factor of the greatest importance. Every Communist, no matter in what organization he belongs, has it continually hammered into his head that the objective of a Communist must be to gain control. As soon as Communists gain control of a union, a strike, or any kind of activity,

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<sup>25</sup> See, e. g., Foster, *From Bryan to Stalin* (International Publishers Co., 1937), particularly pp. 153, 154, 213-215, 272-273, 275-277; Saposs, *Left Wing Unionism* (International Publishers Co., 1926), p. 64; "In the relations of the unions with employers and the government 'class struggle' tactics are counselled as against 'class collaboration' tactics"; Foster, *Toward Soviet America* (Coward-McCann, Inc., 1932), pp. 232-233, 258-259, 266; Gitlow, *I Confess* (E. P. Dutton & Co., Inc., 1940), pp. 334-395; Oneal & Werner, *American Communism* (E. P. Dutton & Co., Inc., 1947), pp. 231-236, 245-246, 312-313; Teller, *Management Functions Under Collective Bargaining* (Baker, Voorhis & Co., 1947), pp. 401, 405-409; Selekman, *Labor Relations and Human Relations* (McGraw-Hill, 1947), p. 206; Smith, *Spotlight on Labor Unions* (Duell, Sloan and Pearce, 1946), pp. 42-43, 63-64; Myers, *Do You Know Labor?* (National Home Library Foundation, 1940), pp. 18-19; Mills, *The New Men of Power* (Harcourt, Brace and Co., 1948), pp. 198-200, 202; Special Report, *The Communist in Labor Relations Today* (Research Institute of America, New York, March 28, 1946).

the Party steps in and runs the union, leads the strike, and directs the activity.

A similar view was expressed by Professor Philip Taft of Brown University:<sup>29</sup>

\* \* \* The trade union is not an organization to which the Communist member owes any ultimate loyalty. Above it stands the "Party" which directs and organizes caucuses and gives orders on policy and program. Consequently Communist trade-union tactics are in the nature of a conspiratorial attack upon the integrity of the trade union, for policy is considered from the point of view of its effect not upon the trade union but rather upon the fortunes of the Communist Party. To capture and subvert the union becomes the principal aim of Communist trade-union policy. \* \* \* Consequently, Communist opposition within trade unions stems from a desire to use the union as an instrument for purposes alien to its character rather than to improve its functioning *per se*.

And Roger N. Baldwin, Director of the American Civil Liberties Union, significantly points out that Communists, "alone of all political parties," follow this practice, i. e., of capturing leadership in unions "in the interest of their own political program and power."<sup>30</sup>

<sup>29</sup> Taft, *Economics and Problems of Labor* (Stackpole & Hicks, Inc., 1948), p. 499.

<sup>30</sup> *Union Administration and Civil Liberties*, The Annals of the American Academy of Political and Social Science, Vol. 248, November 1946, p. 59.

#### 4. *The experience of other countries*

The conclusion that when Communists or their supporters gain control of labor organizations the legitimate objectives of such organizations are subordinated to the political policies of the Communist Party is reaffirmed by the experience of countries like Italy and France, where Communist control of labor unions has become substantial. In Italy, the C. G. I. L., the largest of the existing labor confederations, is Communist-dominated. Notwithstanding the role that it has played in pressing for increased wages and social security benefits,

the policies it followed even in these matters have often reflected the political affiliations of the majority of its leaders. Many of the strikes which have been called—particularly the general strikes—have been for purposes which were political rather than primarily economic. During the first 6 months of 1948, 436 work stoppages involving over 2.8 million workers were reported by the General Confederation of Italian Industry; 49 percent of these strikes, the Confederation attributed to causes other than economic.<sup>31</sup>

The French counterpart of C. G. I. L., the C. G. T., is likewise Communist-dominated. In

<sup>31</sup> *Postwar Labor Movement in Italy*, Advance release of an article scheduled to appear in the January, 1949, issue of the *Monthly Labor Review* (U. S. Dept. of Labor, Bureau of Labor Statistics).



November 1947, the C. G. T. ordered a wave of strikes which paralyzed basic industries in all parts of France. The strikes

were generally ascribed in France to the new Communist tactics of attempting to embarrass the Government and impede adoption of the European Recovery Program by disrupting the national economy.<sup>32</sup>

On December 19, 1947, the principal non-Communist minority group within the C. G. T. formally seceded and set up a rival labor organization, the F. O. It charged that the strike crisis had been "politically inspired"; that the Communist majority had carried the C. G. T. along on its "political adventures," in open violation of the trade-union principle of political party neutrality.<sup>33</sup>

A recent statement issued by the General Council of the British Trade Union Congress demonstrates that, even in England, the Communists have attempted to force British trade union policy into conformity with political objectives dictated by Soviet Russia. The statement reads in part as follows:<sup>34</sup>

After the overwhelming repudiation of Communist attempts at the recent Congress

<sup>32</sup> *Labor Abroad*, December 1947, No. 5 (U. S. Dept. of Labor, Bureau of Labor Statistics), p. 3.

<sup>33</sup> *Ibid.*, February 1948, No. 6, pp. 1-3.

<sup>34</sup> This statement is set forth in Daily Proceedings of the Tenth Constitutional Convention of the Congress of Industrial Organizations, Monday, November 22, 1948, pp. 48-49.

in Margate to dominate Trade Union policy, the Communist Party leadership has declared that opposition to Congress decisions will be carried back \* \* \* to the workshops and every effort made to incite Trade Unionists against the decisions taken in their name on the constructive economic policy of the T. U. C.

The attitude of the British Communists is in full conformity with that of Communist organizations in other countries, notably in France. \* \* \*

These disruptive activities, the General Council are satisfied, are being carried on by the Communist Party and its subsidiary organizations in servile obedience to decisions made by the body calling itself the Cominform, which was set up in the Autumn of 1947 to carry on the International Communist propaganda, formerly conducted by the Communist International (The Comintern). \* \* \*

Since its inception the Cominform has persistently pursued a declared policy in opposition to the European Recovery Programme to which the British Trades Union Congress has given active support. \* \* \*

The Communist Parties, under the direction of the Cominform, have been specifically ordered to oppose the Marshall Plan. Statements made officially by spokesmen of the Communist Party in Britain prove beyond question that sabotage of the [E. R. P.] is its present aim. Communist influences are everywhere at work to frame

industrial demands for purposes of political agitation; to magnify industrial grievances; and to bring about stoppages in industry.

These facts, some of which were directly before the Congress, most of which are well known, and all of which confirm the congressional judgment, permitted Congress reasonably to conclude, as the Seventh Circuit held in the *United Steel Workers* case and the District Courts held in the *N. M. U.* and the *Warehouse Workers* cases, that extension of the benefits and protection accorded in the Act to labor organizations led by Communists and their supporters would not tend to effectuate the policies of the Act; that such organizations would be likely to utilize the powers accorded exclusive bargaining representatives by the Act to foment strikes and discord rather than to promote the economic welfare of union members, and amicably to settle disputes; and that to vest additional power in the hands of such organizations might constitute a danger to national security.

◇ That Congress possesses the power under the Commerce Clause to cope with such evils will be shown in the following section.

C. CONGRESS HAS AMPLE AUTHORITY UNDER THE COMMERCE CLAUSE TO DENY THE BENEFITS OF THE LABOR RELATIONS ACT TO UNIONS WHOSE OFFICERS FAIL TO SIGN THE AFFIDAVITS REQUIRED BY SECTION 9 (H)

1. *Section 9 (h) is reasonably related to an appropriate Congressional objective under the Commerce Clause*

That the fomenting in interstate industry of strikes for the purpose of hampering the execution of American foreign policy, or for political purposes unrelated to the subject matters of collective bargaining, constitutes an economic evil amenable to Congressional control under the Commerce Clause is too clear for anything but statement. Appellants do not even suggest that such strikes are not substantive evils, or that they do not substantially affect interstate commerce. Nor do they make the obviously untenable argument that Congress lacks the power to take measures designed to eliminate the causes of strikes which may obstruct interstate commerce. Cf. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1. It is obviously for Congress to determine the appropriate method for combatting these evils. *North American Co. v. S. E. C.*, 327 U. S. 686; *United States v. Darby*, 312 U. S. 100.

Certainly, when evils result in large part, or in aggravated form, from benefits which Congress itself has created, Congress must possess the power so to restrict those privileges as to prevent their abuse. Congress must have the power to withhold benefits which it confers for the accom-

plishment of legitimate purposes within its constitutional powers from those who, it has cause to believe, may utilize those benefits for different and antithetical purposes. The privileges and benefits of the Labor Relations Act are conferred upon labor organizations by Congress for the accomplishment of specific public purposes; Congress is under no obligation to extend those privileges and benefits to all organizations blindly, without regard to whether such extension will effectuate the policies which Congress seeks to promote. It is no less a legitimate objective of congressional power to guard against the danger of misuse of facilities created by Congress for specified purposes than to create such facilities in the first place.

Judicial "inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *United States v. Carolene Products Co.*, 304 U. S. 144, 154. The facts known to Congress, and of which this Court can take judicial notice (summarized pp. 21-48, *supra*), show that Communists and their supporters in positions of power in labor unions have used and are likely to use their power for political purposes alien to the objectives which Congress in enacting the National Labor Relations Act desired to promote. These facts afford ample basis for the



Congressional judgment that the avoidance of such abuses required denial to labor organizations led by Communists of the benefits of the Act. "When Congress exercises a delegated power such as that over interstate commerce, the methods which it employs to carry out its purposes are beyond attack without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat." *Carolene Products Co. v. United States*, 323 U. S. 18, 31.

The burden, of course, is upon appellants to establish the lack of a rational basis for the Congressional choice of means. Appellants have made no effort to deny the existence of the facts upon which Congress relied. Although they assert that the Government is relying on "questionable" material (Br. 60), they have not challenged any of the facts set forth; facts contained in any material which might be deemed questionable are amply confirmed by other sources. Nor have appellants shown that in fact Section 9 (h) is not a reasonable method of dealing with the evil with which Congress was concerned.

*2. Section 9 (h) meets the clear and present danger test, if that is applicable*

Appellants' contention is that it is not sufficient that Section 9 (h) be reasonably related to the attainment of a legitimate objective under the

Commerce Clause, but that the section must be tested under the "clear and present danger" rule because, allegedly, the statute invades the fundamental right of employees to form labor organizations for purposes of collective bargaining, and because the statute deprives union officers of freedom of speech, freedom of the press and freedom of political affiliation. We shall demonstrate in Points II and III, *infra*, pp. 64-113 that the statute invades none of these rights, that Section 9 (h) in no way limits the right to speak or assemble, and that the mere fact that the classification embodied in Section 9 (h) turns on a matter of belief and affiliation does not change the appropriate test of validity from reasonable basis to clear and present danger: The case does not, therefore, come within the exceptional category referred to in the first *Carolene Products* case. See 304 U. S. 144, 152 n.—

But if we assume *arguendo* either that there is an invasion of civil rights or that a classification in terms of belief can be justified only by a showing of urgent necessity, such a necessity has been shown to exist here. The lower court in the *National Maritime Union* case specifically so held after extended analysis (78 F. Supp. 165-169), and the court below in this case adopted that opinion as its own.<sup>31</sup>

<sup>31</sup> In the courts below the Board believed it unnecessary to argue that the clear and present danger test had been satisfied, since it thought the test clearly inapplicable. It did

The "clear and present danger"-test which appellants claim to be applicable is not a technical verbal formula. *Pennkamp v. Florida*, 328 U. S. 331, 334-336, 352-353. It expresses the considered judgment of the Court that, although the First Amendment does not grant absolute rights, the rights with which it is concerned are not to be limited except where the words used or the activity are directly and immediately likely to bring about some substantive evil. The classic expression of the test is regarded as requiring a "close and direct" or "a real and substantial" relation to such an evil. *Id.* at 336.

Although the Court must exercise an independent judgment as to whether the test has been satisfied (*Thomas v. Collins*, 323 U. S. 516, 531-532), it has indicated in *Bridges v. California*, 314 U. S. 252, 260-261, that where a legislature has "appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance," and where a determination comes to this Court "encased in the armor wrought by prior legislative deliberation," such a "declaration of the [legislative] policy would weigh heavily in any challenge of the law as infringing consti-

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not intend to concede that the test, properly understood, could not be met, even though there seems to have been some misunderstanding of its position by the dissenting judge in this case (R. 21) and in the *United Steel Workers* case (170 F. 2d 247).

tutional limitations." Here, Congress has made the determination.<sup>36</sup>

The test does not envisage only dangers which may imperil the security of the nation, although as we shall argue, the facts supporting the present legislation could meet even such a standard. The principle, as first stated by Mr. Justice Holmes in *Schenck v. United States*, 249 U. S. 47, 52, is that "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils *that Congress has a right to prevent.*" [Italics supplied.] In the *Pennekamp* case the Court made it clear that "The danger to be guarded against is the substantive

<sup>36</sup> As the District Court stated in the *National Maritime Union* case, 78 F. Supp. at 167: "When clear and present danger exists, \* \* \* must somehow be determined; and it will not be often, if ever, that the presence of potential danger, or clear and present danger, can be conclusively demonstrated until the portended harm has been done. Usually the existence of either is a matter of opinion, and it is for the legislative body to form that opinion in the first instance. Congress must decide whether clear and present danger to a national interest exists, and, if so, must determine upon a way to avert it. If the method chosen intrudes upon an individual right guaranteed by the First Amendment, Congress must evaluate the clashing public and private interests, must note how the one will be affected by the restriction, the other by its absence, and must then decide whether to impose the restriction. We take it that the congressional judgment is final unless there was in fact no clear and present danger, which alone justifies impinging upon sacred individual rights."

evil' sought to be prevented" (*id.*, at 335), and "substantive evil" in this context clearly did not refer merely to threats to the safety of the United States.<sup>37</sup> In *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 639, the Court stated that the freedoms granted by the First Amendment "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." [Italics supplied.]

The Court has rejected the argument that the clear and present danger test prevents prohibiting the distribution of religious literature by children (*Prince v. Massachusetts*, 321 U. S. 158, 167), or penalizing the use of language likely to cause a public altercation (*Chaplinsky v. New Hampshire*, 315 U. S. 568). And the assumption underlying the *Bridges* and *Pennkamp* decisions is

<sup>37</sup> "The clear and present danger' to be arrested may be danger short of a threat as comprehensive and vague as a threat to the safety of the Republic or 'the American way of life'. Neither Mr. Justice Holmes nor Mr. Justice Brandeis nor this Court ever suggested in all the cases that arose in connection with the First World War, that only imminent threats to the immediate security of the country would authorize courts to sustain legislation curtailing utterance. Such forces of destruction are of an order of magnitude which courts are hardly designed to counter. 'The clear and present danger' with which its two great judicial exponents were concerned was a clear and present danger that utterance 'would bring about the evil which Congress sought and had a right to prevent.' *Schaefer v. United States*, *supra*." (*Pennkamp v. Florida*, 328 U. S. at 353, Frankfurter, J., concurring.)



that expressions which would in fact constitute a serious danger to the fair administration of justice could be punished. Although these cases involved important substantive evils, none of them were concerned with anything menacing the national security.

The substantive evil here is the danger of harmful obstruction to interstate commerce which is likely to result if Communists are in control of labor organizations. This evil Congress unquestionably has a right to prevent. And leaving Communists in office in such organizations subjects commerce to this danger not only immediately, but clearly and definitely, as experience has shown. See pp. 21-48, *supra*. A direct and immediate method of seeking to avoid such obstructions to commerce is to take steps which may free labor organizations from Communists' control. Inasmuch as such control has in the past led to interruptions to commerce, and there is strong reason for believing that it will continue to do so now and in the future, the clear and present danger test is satisfied.

As the District Court stated in the *National Maritime Union* case (78 F. Supp. at 167), Congress "had before it evidence of instances in which strikes have been called, for political reasons only, through the influence of Communists in unions. That this is true is a matter of general knowledge. \* \* \* It knew that one of the purposes

of the Communist Party is to destroy democratic institutions and that infiltration into labor unions is one of the first steps in the process. In addition to proof of overt acts, it had before it opinions as to the nature and purposes of the Communist Party from persons in position to have knowledge of the subject," (referring to statements of union officers and of President Truman). That court, we think properly, concluded (p. 168), "In considering the matter we have before us the same evidence and information which Congress had in forming its judgment. If that were all, we would not be prepared to say that Congress was wrong in seeing danger and in thinking it clear and present. But we have much more than that. We judicially know the facts of current history and cannot close our eyes to them and to their significance. Events on the national and world stages since the Taft-Hartley Act became law on June 23, 1947, have not removed the basis which the Congress then had for deciding that Communist influence in labor relations was a clear and then present danger to the national welfare and security. Those events have, on the contrary, emphasized the ground for alarm which Congress felt." <sup>37a</sup>

<sup>37a</sup> Pursuant to authority granted by Executive Order No. 9835, 12 F. R. 1935, the Attorney General has classified the Communist Party, U. S. A., as a subversive, communist organization which seeks to alter the form of government in the United States by constitutional means. See 13 F. R. 9366-9369.

The cases suggest that the evils which justify a limitation upon First Amendment rights must be "substantial" or "serious," not a "minor matter of public inconvenience or annoyance," (*Bridges v. California*, 314 U. S. 252, 262-263), such as the littering of the streets with handbills. Cf. *Schneider v. State*, 308 U. S. 147. But certainly the evil at which Section 9 (h) is directed is a serious one. Use of facilities and benefits accorded by Congress for purposes antithetical to the policies and objectives of the Act is a serious evil which Congress must have power to prevent. Moreover, the abuses take the form of obstructing commerce in the interest of a foreign power which in many fields is actively opposing the United States. This is certainly no light matter.

Indeed, even if the criterion were whether the evil in question was a menace to our national security, Section 9 (h) would be valid. For the national security was in large part precisely what Congress was concerned with, as the repeated reference to the Allis-Chalmers strike shows. The danger in the present state of world affairs of subjecting such industries as the manufacture of electrical equipment and radio communications to the risk of interruption in the interests of a foreign power need no elaboration. See pp. 26-28, 30-33, *supra*. And the clear and present danger test does not require Congress to wait until it is too late before taking precautionary action.

D. SECTION 9 (H) IS AN APPROPRIATE MEANS OF ATTAINING THE  
CONGRESSIONAL OBJECTIVE

There can be no question but that Section 9 (h) embodies a reasonable method of protecting commerce and the national interest against strikes ~~called by labor leaders~~ affiliated with the Communist Party. Congress could properly consider that not only those union leaders who were themselves Communists or affiliated with the Party, but also those leaders who believed in, or supported organizations which believed in, overthrow of the Government by violence or illegal means, might tend to utilize their powers as exclusive bargaining representatives for objectives alien to collective bargaining concerning "wages, hours, or other working conditions." Certainly, as stated by the Court of Appeals for the Seventh Circuit in the *United Steel Workers* case, *supra*, 170 F. 2d at 266, "it was rational for Congress to conclude that [such persons] were more likely than others to misuse the powers which inhere in union office." Cf. *Bryant v. Zimmerman*, 278 U. S. 63, 73, 76-77, discussed at length in the opinion of the District Court in *National Maritime Union v. Herzog*, 78 F. Supp. 146, 169-170; *Clarke v. Deckebach*, 274 U. S. 392, 396-397; *Hirabayashi v. United States*, 320 U. S. 81.

The restriction of the benefits of the statute to labor organizations whose leaders can sign the required affidavit gives the unions an incentive to rid themselves of officers who cannot, and gives

the employees an incentive to designate as their representative for purposes of collective bargaining labor organizations which will not be disqualified by reason of the character of their officers. Since the benefits of the statute are valuable to labor organizations and to their members, Section 9 (h) will tend to cause the removal of Communist officers from American unions, and thereby to minimize the danger of abuse of the privileges granted by the statute and of injury to the interest of the United States.

The affidavit provisions of Section 9 (h) were also intended to accomplish the identification of those union leaders who were Communists and supporters of Communists on the theory that if the union members were aware of such affiliation by their officers they would oust them from office. See *Matter of Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. 11. Certainly, Congress has the power to require the disclosure by those who compete for employees' support of information which the employees might consider highly relevant to their choice; this is a reasonable method of insuring the intelligent exercise of the employees' freedom to choose their own representatives for purposes of collective bargaining.

It is not argued that Section 9 (h) is not likely to produce these results. Suggestions have been made, however, that other methods of doing so could have been employed instead. But which means of accomplishing its objective should be



chosen was obviously a matter for Congress to decide, and the fact that other methods might also have been available does not affect the constitutionality of any reasonable method adopted.

An alternative proposed in Congress and adopted by the Senate was the requirement, in lieu of an affidavit, that "no union could be certified if any of its officers were Communists" (93 Cong. Rec. 4894). But this would have required the Labor Board in each case to hold a hearing in order to determine whether any of the officers of the unions involved were Communists. As Senator Taft pointed out, in explaining why the conferees rejected the Senate proposal and substituted the affidavit requirement (93 Cong. Rec. 6447):

That seemed to us impractical. \* \* \*

The whole certification might be tied up for months while determination was made as to whether a man was a Communist.

Another alternative would be flatly to forbid Communists and persons believing in the overthrow of the government to be officers of labor organizations. This would have been much more drastic than the affidavit requirement, and might have raised more difficult legal problems than a requirement which does not deprive any persons of the right to be officers, but merely gives the labor organizations a choice as to whether they wish to retain such officials or to enjoy the benefits of the statute. In any event, the fact

that Congress did not make use of a stronger method for achieving its goal does not make the milder one unconstitutional.

Appellants urge that if the objective of Congress was to prevent political strikes, and "assuming also that Congress had the power to eliminate such strikes, an obvious method of preventing that practice would be to prohibit it and punish those who actually are guilty of violating that prohibition" (Br. 79). But Congress had the right to choose a preventive measure, to seek to remove a cause of such strikes before the strikes actually occur. Compare *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1. This is a more effective means of safeguarding the public interest than to leave persons thought likely to instigate such strikes in positions where they can do so, and then to punish them afterwards. The availability of other appropriate means for achieving the end does not invalidate the method Congress has chosen.

The suggestion that the classification is unreasonable and therefore invalid because employers are not required to file similar affidavits requires little comment. "Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent." *Hirabayashi v. United States*, 320 U. S. 81, 100. That rational basis exists for distinguishing in legislative treatment between

labor organizations, on the one hand, and employers on the other, is established by abundant authority. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46; *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 471-472; *United States v. Petrillo*, 332 U. S. 1, 8-9; *American Federation of Labor v. American Sash & Door Co.*, No. 27, October Term, 1948, decided January 3, 1949.

Appellants argue that Section 9 (h) is arbitrary in that "it adopts the test of guilt by association" (Br. 74). But when acting in order "to prevent potential injury to the national economy from becoming a reality", Congress has the right to impose a regulation upon a class from which the particular evil is to be anticipated, and the fact that all persons in the class may not engage in the harmful conduct does not make the classification improper so long as it is reasonable. *North American Co. v. S. E. C.*, 327 U. S. 686, 710-711. " \* \* \* if evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." *Ibid.* Section 9 (h), like Section 11 (b) (1) of the Public Utilities Holding Company Act, "is not designed to punish past offenders but to remove what Congress considered to be potential if not actual sources of evil". *Ibid.*

*United Public Workers v. Mitchell*, 330 U. S. 75 and the *Hirabayashi* and *Korematsu* cases (320 U. S. 81 and 323 U. S. 214) present examples of situations in which legislation regarded as reasonable was made applicable to a class of persons even though it was recognized that no harmful conduct was to be expected from many members of the class. These cases are illustrative of the principle that "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." *Westfall v. United States*, 274 U. S. 256, 259; *Purity Extract Co. v. Lynch*, 226 U. S. 192, 201-202, and cases cited. Preventive measures of this sort are different from the imputation of personal guilt to an individual for purposes of punishment or the like, such as denaturalization or deportation. Cf. *Schneiderman v. United States*, 320 U. S. 118.

## II

### DENIAL OF ACCESS TO BOARD FACILITIES DOES NOT IMPINGE UPON THE FUNDAMENTAL RIGHT TO SELF-ORGANIZATION FOR PURPOSES OF COLLECTIVE BARGAINING

Appellants contend (Br. 8, 12, 26-27, 29-31) that denial of access to Board facilities, which, under the terms of Section 9 (h), is the sole consequence of non-compliance with the affidavit provision, in itself invades the fundamental right of employees to organize and bargain collectively

with employers through representatives of their own choosing. In support of this contention, appellants assert (Br. 12-17) that a union which is denied access to Board facilities is, as a practical matter, unable to function as a labor organization at all. After equating in this manner denial of access to Board facilities with a prohibition upon functioning as a labor organization, appellants argue further (Br. 27, 29-31) that to condition the union's right to function upon its elimination from official position of persons who cannot or will not file the affidavits contemplated by Section 9 (h) is to deprive such persons of their right to practice the occupation of labor union official and further to deprive the members of the union of their right to select such persons as officers. We shall demonstrate below that denial of access to Board facilities, as contemplated by Section 9 (h), does not, either in law or in fact, deprive any labor organization of the power to function, and that it does not invade any private right of the union or its members to organize for purposes of collective bargaining. Because the statute does not in law or in fact prohibit labor organizations whose officers do not comply with the affidavit provision from functioning, the statute cannot be said even indirectly to deny to anyone the right to act as officer of a labor union, or deny to union members the right to select any officers of their own choosing.



A. DENIAL OF OPPORTUNITY TO PARTICIPATE IN A BOARD ELECTION DOES NOT  
DEPRIVE A LABOR ORGANIZATION OF ANY PREEXISTING PRIVATE RIGHT

It is important at the outset to emphasize that the fundamental right of employees to associate in labor organizations for purposes of collective bargaining,<sup>35</sup> which appellants claim is invaded by Section 9 (h), does ~~not~~, on any theory, comprehend a right to compel Congress to require employers to recognize a labor organization or to bargain collectively with it. Certainly Congress was not required by the Constitution to enact the National Labor Relations Act, and the rights under that Act are no more immune from legis-

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<sup>35</sup> It is not necessary in this case to decide whether there is a constitutional right to self-organization for purposes of collective bargaining. While certain activities of unions, such as solicitation of members through speeches (*Thomas v. Collins*, 323 U. S. 516) and the dissemination of information (*Thornhill v. Alabama*, 310 U. S. 88), or the assembling, discussion, or formulating of plans (*Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, No. 47, October Term, 1948, decided January 3, 1949) are constitutionally protected, no case holds that the right of self-organization for purposes of collective bargaining is otherwise protected by the First Amendment. Certainly the leading cases which refer to such a "right" do not so suggest. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33; *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209; *Texas & N. O. R. Co. v. Brotherhood of Ry. Clerks*, 281 U. S. 548, 570. Even though conduct "is engaged in pursuant to plans of an assembly" it is not protected under the First Amendment; when it "affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct conforms to valid law." *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, *supra*, slip op. pp. 5-6.

lative control than other rights created by statute. As the Seventh Circuit stated in upholding the validity of Section 9 (h), *United Steel Workers v. National Labor Relations Board*, 170 F. 2d 247, 265, pending on petition for certiorari, No. 431, this Term, in enacting the National Labor Relations Act, "Congress imposed new obligations upon employers and provided administrative machinery for the enforcement of those obligations, but it did not impose those duties because it was under a constitutional obligation to employees or labor organizations to do so. On the contrary, the statute was enacted solely because Congress deemed the imposition of those duties desirable as a means of protecting the public interest in the free flow of commerce."

Furthermore, the denial to unions not complying with Section 9 (h) of access to Board facilities does not prevent them from functioning. Even if such unions are excluded from the ballot, employees favoring them can avoid representation by any other organization by voting against such organization. They will thus retain the same right to bargain through the non-complying union as they would have possessed if the National Labor Relations Act had never been passed. Only if a majority of the employees in a bargaining unit select another labor organization as exclusive representative is the non-complying organization affected; and, in that event, the loss of its right

to represent its members flows not from the Board's action, but from the deliberate choice of the employees."

Appellants contend, however (Br. 12-17), that opportunity to share with other unions in the benefits of the Act is so essential to the effective functioning of a labor union that to permit access to some unions while denying access to others results inevitably in destruction of the excluded organizations and thereby denies their right to organize for purposes of collective bargaining.

"Appellants argue that the right to function as a union was invaded because Section 8 (b) (4) (C) makes it unlawful for a labor organization to strike to compel an employer to deal with it if another labor organization has been certified by the Board. But the other organization will not have been certified unless it has secured the approval of a majority of the employees in the bargaining unit. In addition, the provision in question applies to unions which have complied with Section 9 (h) just as much as to unions which have not. Furthermore, the validity of Section 8 (b) (4) (C) is plainly not subject to attack in this proceeding; the provision is enforceable only through a proceeding instituted by the General Counsel of the Board. Section 10 (1) of the Act; *Watson v. Buck*, 313 U. S. 387; *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 461.

The effect of Section 8 (b) (4) (C) upon a non-complying union is the same whether or not they fail to comply with paragraphs (f) and (g) of Section 9 or paragraph (h). In the one situation as in the other, it cannot strike to prevent an employer from dealing with a certified union. In *National Maritime Union v. Herzog*, 78 F. Supp. 146, affirmed, 334 U. S. 854, the same argument was advanced by the union. Although the point was not mentioned by either court, the decision, affirmed by this Court *per curiam*, that paragraphs (f) and (g) were constitutional, necessarily rejected the contention. The *N. M. U.* case is analyzed, *infra*, pp. 75-77.

We concede, of course, that the privilege of utilizing the facilities of the Board to compel an employer to bargain collectively and to desist from other unfair labor practices is of great value to labor organizations and that a labor organization denied this privilege is not, *pro tanto*, in as advantageous a position to appeal to employees for designation as bargaining representative as is a competing union to which the privilege is accorded. Congress, indeed, relied exclusively upon this fact to induce labor organizations to comply with the provisions of Section 9 (f), (g) and (h). But the facts do not warrant appellants' attempt to give the impression that a labor organization denied the privilege will inevitably be rejected by employees. The United Mine Workers of America, the United Electrical Radio and Machine Workers of America, C. I. O., the United Steelworkers of America, C. I. O., all non-complying unions, among others, have continued to exist and to function, and in some instances to increase their membership substantially, despite their non-compliance.<sup>40</sup>

Nevertheless, even if it were true that a labor organization's privilege of access to Board facilities was in all instances decisive in the minds of

<sup>40</sup> The officers' report to the 13th convention of the United Electrical Workers, as reported in the UE News, September 11, 1948, p. 5, 8, stated: "Average membership in UE for the convention year August 1947 to July 1948 was at an all-time high, six percent above the previous years record membership."



employees, so that employees uniformly selected complying rather than non-complying unions as their representatives, it would not follow that Congress could be said to have infringed the right of non-complying labor organizations to function. Section 9 (h), like Sections 9 (f) and (g), leaves the right and power to determine whether to be represented by a complying or non-complying union to the voluntary choice of the employees. The most that can be said is that by offering advantages to complying unions which are denied to non-complying unions, Congress induces employees to select the former rather than the latter type of union as bargaining agent. But such inducement neither deprives the employees of the right to select non-complying unions as their representative, nor does it deprive non-complying unions of the right to represent those who choose to designate them.

That legislation may induce individuals voluntarily to exercise their rights in a particular manner rather than in another does not establish that the legislation invades rights or coerces individuals in their exercise. If it did, Congress would have been without power to enact the Social Security Act, in which Congress offered a rebate of ninety percent of the unemployment compensation taxes collected within the state to those states which enacted particular types of unemployment compensation legislation. For it was assumed that



the right to determine whether or not to enact such legislation is reserved by the Constitution exclusively to the states, and if inducement to enact such legislation were deemed to invade this right, or to coerce the states to enact social security legislation, the federal act would not have been permitted to stand. Yet, in *Steward Machine Co. v. Davis*, 301 U. S. 548, 585-591, the Court held that although the ninety percent rebate offered to the states constituted powerful "inducement" and "temptation" to enact the congressionally desired legislation, this did not establish "coercion" of the states in violation of the Tenth Amendment. To fail to draw the line between "temptation" and "coercion", said Mr. Justice Cardozo speaking for the Court, is "to plunge the law into endless difficulties." 301 U. S. at 589-590. The Court further held that since the imposition of taxes and the granting of rebates was an appropriate exercise of the power of Congress over taxation and expenditures, the legislation could not be condemned because it tended to accomplish results which Congress could not achieve directly by legislative compulsion.

Appellant seeks to distinguish the *Steward* case (Br. 47) on the ground that there the States could lawfully cooperate with the Federal Government by enacting the legislation Congress desired. But this distinction hardly supports appellants' position in this case. For it certainly cannot be suggested that employees do not have the right to

cooperate with Congress in the attainment of its legitimate goal by selecting complying rather than non-complying unions as their representatives. Where, as in Sections 9 (f), (g) and (h), and in the Social Security Act, Congress grants benefits upon condition, the condition is not to be invalidated unless the conduct required for its fulfillment is unrelated to the legitimate purposes for which the benefit is granted, or to any other legitimate end. Where reasonable relation exists between the condition and the legitimate legislative end to be attained, as the *Steward* case holds, "inducement or persuasion does not go beyond the bounds of power." 301 U. S. at p. 591.

This principle applies even when the exercise of the right which Congress seeks to influence is protected by the First Amendment. *Oklahoma v. Civil Service Commission*, 330 U. S. 127; *United Public Workers v. Mitchell*, 330 U. S. 75. In the *Mitchell* case it was held that Congress could condition the privilege of federal employment upon non-exercise by employees of their constitutional right to engage in partisan political activity. In the *Oklahoma* case, it was held that Congress could constitutionally condition grants-in-aid to the States upon removal by the States from their payrolls of persons who exercised their constitutional right to engage in political activity. Yet clearly Congress could not constitutionally have prohibited such activity by State employees.

Nor could Congress constitutionally have compelled State governments so to restrict political activity by their employees.

In the *Oklahoma* case, the effect of the legislation was to induce individuals to forego the exercise of rights altogether. The effect of Section 9 (f), (g) and (h), however, is not to induce employees to forego the selection of a bargaining representative, but rather to select a bargaining representative which has met the qualifications for receipt of benefits under federal law, qualifications properly imposed by Congress to protect the objectives of the Act and national security.

In sum, assuming *arguendo* that Congress could not prohibit employees from designating non-complying unions as their representatives, or prohibit non-complying unions from representing their members in collective bargaining, the foregoing cases establish that the action of Congress in Sections 9 (f), (g) and (h), in offering inducements to employees to select complying rather than non-complying unions as their representatives, does not invade the right of employees freely to choose representatives or the right of non-complying unions to function. Congress has "authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *Oklahoma v. Civil Service Commission*, *supra*, at p. 143. That the adoption of particular means may

have an effect upon activities which Congress may not constitutionally control, does not, as the Court specifically held in the *Oklahoma* case, make the use of such means invalid.

We do not contend, of course, that if the condition contained in Section 9 (h) were totally unrelated to any legitimate objective of Congress," appellants could not raise constitutional objection, merely because the statute does not prohibit non-complying unions from functioning. Just as a tax imposed by Congress is not valid "if it is laid upon the condition that a state may escape its operation through adoption of a statute *unrelated* in subject matter to activities fairly within the scope of national policy and power" (*Steward Machine Co. v. Davis*, 301 U. S. at 590, italics added), so the denial of benefits under the Act would not be valid if the conditions which labor organizations are required to meet to obtain those benefits were unrelated in subject matter to objectives which Congress legitimately sought to promote and encourage. We have already demonstrated, however, that the objective which Congress sought to achieve by imposition of the condition contained in Section 9 (h) is a legitimate objective, well within the power conferred upon Congress under the Commerce Clause, *supra*, pp. 49-58, and that the means, adopted in Section

Although appellants suggest that the Government argues that Congress can withdraw the privilege of using Government facilities at will, no such argument has been advanced.

9 (h) for accomplishment of that objective are reasonably and directly related to that objective, *supra*, pp. 58-64.

Accordingly, *Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583, upon which both appellants (Br. 46-47, 54-55) and Judge Major dissenting in the *United Steel Workers* case rely (170 F. 2d at 260), is wholly inapposite here. In *Stephenson v. Binford*, 287 U. S. 251, 272, 275, the Supreme Court explained that the rule of the *Frost* case applied only where there was "no relation" between the condition and the privilege accorded, i. e., where the condition was an end in itself and not a "means to the legitimate end." Where, as here and in the *Stephenson* case, there is a reasonable relationship between the condition and the legitimate objects for which the benefits are given, the legislation is not to be invalidated even where compliance with the condition may involve voluntary surrender of a constitutional right. See Hale, *Unconstitutional Conditions*, 35 Cal. L. Rev. 321, 357.

We believe that the decision of this Court in *National Maritime Union v. Herzog*, 334 U. S. 854, is dispositive of appellants' claim that denial of the benefits of the Act to unions which do not comply with conditions validly imposed by Congress invades the right of such unions to function or the right of employees to bargain collectively through such unions. The consequence of non-compliance with Sections 9 (f) and (g) are pre-



cisely the same as the consequences of non-compliance with Section 9 (h), and the union in the *N. M. U.* case made precisely the same contentions with respect to the effect upon it of denial of access to Board facilities as do appellants in this case. It was argued there that access to the administrative machinery and benefits of the Act is so essential to the effective functioning of labor unions that to deny such access to some unions while permitting access to others results inevitably in destruction of the excluded organizations and thereby denies their right to organize for purposes of collective bargaining. It was further argued there, as here (Br. 57-62), that because of the "results that flow", access could be denied to certain labor organizations only if some "clear and present danger" required this, and that access could not be made conditional upon filing and reporting requirements which were supported merely as reasonable requirements.

In affirming the judgment of the statutory court and rejecting the position taken by the union on appeal, this Court necessarily held (334 U. S. 854-855), that denial of access to the machinery and benefits of the Act to labor organizations which do not comply with conditions precedent erected by Congress, and granting such access to those which do comply, does not invade the constitutional right of the former so long as

the condition is reasonably related to the objectives for which the facilities of the Act were designated.

2. DENIAL OF THE PRIVILEGE OF PARTICIPATING IN A BOARD CONDUCTED ELECTION TO A LABOR ORGANIZATION WHOSE OFFICERS ARE UNABLE OR UNWILLING TO FILE THE AFFIDAVITS CONTEMPLATED BY SECTION 9 (H) DOES NOT DENY TO UNION MEMBERS THE RIGHT FREELY TO SELECT OFFICERS, NOR DENY TO ANY PERSON THE RIGHT TO HOLD OFFICE IN A LABOR ORGANIZATION.

Appellant's contention (Br. 27, 29-31) that Section 9 (h) denies to union members the right to select officers of their own choosing, and, denies to officers who cannot or will not file the affidavits the right to hold office in a union, rests upon the assumption, shown above to be unwarranted, that denial of the benefits of the Act prohibits a labor organization from functioning. This contention likewise is disposed of by the decision in the *N. M. U.* case, *supra*. Thus, if Section 9 (f) had imposed the obligation to file financial reports on one or more officers of the union, rather than upon the union as such, it could hardly have been contended that the Section was an unconstitutional interference with the right of unions to select their own officers merely because to secure the benefits of the statute union members might require their officers to file such returns or oust those officers who refused to do so.

In his dissenting opinion in the *United Steelworkers'* case, *supra*, 170 F. 2d at 259, Judge Major took the position that because the affidavits contemplated by the Section are to be made by

union officers, whereas the denial of benefits affect the union as such, the statute is arbitrary and unreasonable. But this argument overlooks the fact that a union can act only through its officers, and that Section 9 (f), while it speaks in terms of filing by the union, contemplates that such filing will be done by the responsible officers of unions, precisely as does Section 9 (h). If the responsible officer or officers failed or refused to comply with the filing requirements of Section 9 (f) for whatever reason, the union's membership would be placed in precisely the same position as they would if the union's officers failed to file the Section 9 (h) affidavits. The suggestion that the union members desiring to obtain the benefits of the Act would be unable to do so because they could neither compel their officers to file the documents nor oust those who refused to do so is one which even the appellants do not make, presumably because, among other things, recent history demonstrates that such a contention would be wholly without substance.

The argument that Congress is wholly without power to distinguish between bargaining representatives or types of union leadership with respect to bestowing the benefits of the Act, because such distinction tends to influence employees to choose eligible rather than ineligible officers as bargaining representatives, would mean that Congress could not distinguish for this pur-

pose between company-dominated unions and others. By denying to company-dominated unions the benefits of the Act, Congress influences employees to select non-company-dominated unions just as by Section 9 (h) employees are influenced to select non-Communist dominated unions. In neither case is the right of employees to join labor organizations or to select representatives of their own choosing denied or infringed.

The fact that an effect of Section 9 (h) is to induce union members to select as officers persons who comply with Section 9 (h) rather than those who do not, upon which appellant relies to establish that the Section infringes the right of union members to select their own officers, does not, as we have shown above, establish any invasion of this right. Since the selection by union members of officers who execute the affidavits contemplated by Section 9 (h) is a legitimate objective of Congress, the inducement offered to achieve this result "does not go beyond the bounds of power" *Steward Machine Co. v. Davis*, 301 U. S. at 591.

By the same token, there is no merit in appellants' contention that because persons who desire to retain union office may be induced to restrict their political activities and beliefs, the statute must be considered as though it prohibited persons who sought union office from engaging in such activities or entertaining such beliefs.

Determination whether or not to file the affidavit is, under the statute, a matter left to the voluntary decision of each union officer. Not only does government not impose any penalty upon officers who refuse to execute the affidavits, but the union members may, or may not, as they voluntarily determine, oust from office one who refuses to execute the affidavit. If a labor organization voluntarily adopted a provision in its constitution, prohibiting Communists from holding union office, as many labor organizations have done before as well as since enactment of Section 9 (h),<sup>42</sup> it could hardly be contended that any right of such persons was thereby invaded.

Since Section 9 (h) does not compel or coerce labor organizations to adopt such provisions, but merely constitutes an inducement to them to take such action, it is clear that Congress has not denied to Communists and their supporters the right to hold office in labor unions. The inducement offered by Section 9 (h) for such action could be deemed unjustified, as we have seen, only if it could be said that Congress had no legitimate concern with whether labor organizations were led by Communist or non-Communist officers. In the light of the evidence set forth above covering the propensities of Communist officers of labor unions to utilize the powers of union office to impede collective bargaining, disrupt interstate commerce by political strikes called in

<sup>42</sup> See Appendix B, *infra*, pp. 144-145.



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the interest of Soviet Russia, and to jeopardize national security, it can hardly be suggested that Congress had no legitimate concern with this question.

### III

**SECTION 9 (H), DOES NOT INVADE APPELLANTS' RIGHTS TO FREEDOM OF SPEECH, OR DENY FREEDOM OF POLITICAL BELIEF, ACTIVITY OR AFFILIATION**

**A. NOTHING IN SECTION 9 (H) DENIES TO A COMMUNIST, AN AFFILIATE OF THE COMMUNIST PARTY, OR A SUPPORTER OR MEMBER OF AN ORGANIZATION BELIEVING IN OR TEACHING FORCEFUL OR ILLEGAL OVERTHROW OF THE GOVERNMENT, THE RIGHT TO CONTINUE TO BE SUCH**

Appellants contend (Br. 26-31, 40-51), that Section 9 (h), by withdrawing access to the facilities of the National Labor Relations Board from unions whose officers cannot, or will not, file the required non-Communist affidavit abridges their right to freedom of speech and freedom of political association in violation of the First Amendment. Arguing that in the absence of a "clear and present danger" any statute which inhibits freedom of expression must fall, appellants insist that Section 9 (h) limits the political beliefs and activities of union leaders, and thus conditions resort to Government facilities upon the surrender of a constitutional right. The short answer to this contention is that even assuming that Congress may not place any restriction upon the right of a union officer to be a Communist, to believe in Communism, or to engage in political activity, Congress may, in creating an agency designed to further collective bargaining and eliminate indus-

trial strife, deny resort to that agency to those who, in the reasonable judgment of Congress, would utilize it to frustrate rather than to attain the statutory objectives.

It is important, at the outset, to emphasize that Section 9 (h) imposes no limitation upon what any labor leader or other person may think or say, orally or in writing, nor does it attempt to prohibit or restrain anyone from joining or supporting any organization. Neither belief, nor speech, nor association is the subject matter of the policy of Section 9 (h). That subject matter, like the subject matter of Sections 9 (f), and (g), is the means provided for Federal protection of federally created public rights in the field of employee self-organization. The object of Section 9 (h), like the object of Sections 9 (f) and (g), is to guard against abuse of that protection and thereby to facilitate the attainment of the legitimate objective of the legislation. *United Steel Workers of America v. N. L. R. B.*, 170 F. 2d 247, 263 (C. A. 7), petition for certiorari pending; No. 431, this Term; *National Maritime Union v. Herzog*, 78 F. Supp. 146 (D. D. C.), affirmed, 334 U. S. 854.

It is therefore entirely inapposite to the issues here presented to cite, as the Union does, such cases as *Thomas v. Collins*, 323 U. S. 516; *Whitney v. California*, 274 U. S. 357; *DeJonge v. Oregon*, 299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242; *Stromberg v. California*, 283 U. S. 359; *Love v. Griffin*, 303 U. S. 444; *Schneider v. State*,

308 U. S. 147; *Thornhill v. Alabama*, 310 U. S. 88; *Bridges v. California*, 314 U. S. 252; and *West Virginia Bd. of Education v. Barnette*, 319 U. S. 624. In each of the foregoing cases, this Court was concerned with the effect of legislation, or of executive or judicial action, which imposed a prior restraint upon speech, press, or assembly, or which punished individuals for having published their views or having joined an association, or which required adherence to a belief.

In *Thomas v. Collins*, *supra*, for example, this Court held unconstitutional a state statute which imposed a prior restraint (requirement of registration) upon the right through a public speech to solicit membership in a labor organization.<sup>45</sup> There speech itself was restrained by the statute; criminal punishment was imposed on the act of speaking if the speaker had not previously reg-

<sup>45</sup> It may be noted, in passing, that that case did not hold that the states were without power to impose registration or licensing requirements upon the occupation of labor union officer, which carries with it the power to call or instigate political, as well as economic, strikes. That occupation, like the practice of medicine and dentistry, and other fiduciary occupations, affects the interest of union members, and of the public, and is therefore subject to regulation to the extent necessary to protect legitimate public interests. "That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted." *Thomas v. Collins*, 323 U. S. at 532. And this Court pointed out in *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 469, "labor organizations are subject to regulation." Accord: *National Maritime Union v. Herzog*, 78 F. 2d 146 (D. D. C.) affirmed, 334 U. S. 854.



istered. In the *Herndon*, *Stromberg*, and *Thornhill* cases, *supra*, the statutes involved made the acts of speaking or of distributing literature, or of displaying symbols a crime. In the *Lovell* case, *supra*, the statute involved imposed a licensing requirement as a condition upon the distribution of literature, and made such distribution without prior license a crime. In the *DjJonge* and *Whitney* cases, *supra*, the statutes involved made the act of joining a lawful organization, or attending a lawful public meeting a crime. In *Saia v. New York*, 334 U. S. 558, the statute imposed restraints upon the use of loud speakers, which the Court regarded as a protected instrumentality of speech. In the *Schneider* case, *supra*, the state restricted opportunity for distributing literature by prohibiting distribution on the streets. In the same category is *West Virginia State Board of Education v. Ba. aette*, 319 U. S. 624, where, as a consequence only of their religious beliefs, a child's failure to salute the flag was punished by expulsion from school, thereby branding the child a "delinquent," and subjecting its parents to fine and imprisonment. 319 U. S. at 629, 632.

It is to statutes such as these, which impose prior restraints upon speech, press or assembly, or which make speech or the distribution of literature, or attendance at a meeting, or membership in an association, or refusal to take an oath an offense, that the "clear and present" danger rule



to which the Union refers applies. Only statutes which restrict opportunities for the expression or dissemination of views and information, or prohibit the expression of particular views in order to protect some competing public interest must be narrowly drawn to deal with the precise evil which the legislation seeks to curb; only such statutes must define specifically the conduct which is prohibited so that individuals may be entirely free to engage in conduct which the Government may not properly forbid.

As the Court of Appeals for the Seventh Circuit stressed in the *United Steel Workers* case, *supra*, 170 F. 2d at 264, Section 9 (h) does none of these things. It does not deny to Communists, or to supporters of "Communist Front" organizations, the right to speak and to publish freely their views and opinions. It does not deny to them the right to continue to remain members of the Communist Party, or to continue to support "Communist Front" organizations. It does not deny to any person the right to believe in violent overthrow of the Government, or to support organizations which advocate such a program. None of these activities or beliefs is made subject to prior restraint by Section 9 (h); nor does that Section make these activities or beliefs punishable either criminally or by the imposition of civil sanctions.

It may be suggested that although Section 9 (h) does not completely deny the right to hold

and express the views described in the Section, the Section does work a distinct and serious diminution of that right by denying to individuals the right to hold such views and, at the same time, be a union officer. In the first place, however, as we have shown (*supra*, pp. 76-80), Section 9 (h) does not deny to anyone the right to be a union officer; it merely gives the union a strong incentive to select other officers by depriving it of statutory privileges if it does not do so. But since it does make it more difficult for Communists and the like to hold such office, we shall test its validity in this connection on the assumption that Section 9 (h) does deny to Communists the right to hold union office.

Section 9 (h) does not deny to Communists all right to earn a livelihood. At most, Section 9 (h) denies a Communist (we are assuming) the right to be a union officer. That right is no more a civil right in the sense that it can be invaded only on a showing of "clear and present danger" than the right to be a corporate executive. Many statutes limiting the right to engage in special occupations have been sustained if they satisfy the test of rationality, without any suggestion that the clear and present danger rule governing restrictions upon First Amendment rights was in any way applicable.

A labor union officer has fiduciary duties, as well as public responsibilities (see pp. 123-124, *infra*), like a lawyer or an official of a bank or insurance company, and the power to regulate unions (*Thomas v. Collins*, 323 U. S. at 532) includes the right to condition the holding of union office upon the satisfaction of reasonable requirements in the public interest. Compare *In re Summers*, 325 U. S. 561; *Kotch v. Pilot Comm'rs*, 330 U. S. 552.

It is true that a Communist in union office often has greater access to an audience which will listen to an expression of his political views than a Communist who is not. But such an additional opportunity to reach others, derived from position or wealth, has never been held to be a right subject to regulation only in the most serious of situations. A lawyer may also, by reason of his occupation, be in position to influence other persons' conduct by what he says. But it has never been suggested that such opportunity converts what is, at best, a property right in a position, subject to regulation if there is "basis in reason" for the regulation, into a civil right whose deprivation government must justify on a strong showing of imminent danger sufficient to warrant curtailment of the right. Cf. *Griesaert v. Cleary*, No. 49, this Term, decided December 20, 1948, slip opinion, p. 3.

B. SECTION 9 (H) DOES NOT REGULATE POLITICAL AFFILIATION OR BELIEF :  
THE CLASSIFICATION ADOPTED IS VALID IF REASONABLY RELATED TO THE  
END CONGRESS COULD LEGITIMATELY ACCOMPLISH

Appellants argue that the affidavit requirement is based upon political affiliation or belief, and that the Constitution forbids discrimination or classification having such a basis. It is important to note just what the statute does say in this respect. The required affidavit must disavow, insofar as here pertinent, two things: (1) membership in or affiliation with the Communist Party, (2) belief in "the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

Appellants' discussion of the scope and meaning of our basic constitutional liberties is entirely in the abstract; nowhere do they even refer to the fact that Congress reasonably concluded that the particular membership and belief here involved when held by an officer of a labor union, was likely to cause such officer to use the powers of his position in a fashion inimical to the policies of the Act and the security of the United States.

Insofar as the Communist Party is concerned, appellants' contention runs that the Party is a political party, and that discrimination or classification on the basis of political affiliation is not permissible. And that argument is thought to be conclusively established by the fact that no such requirement would be permitted as to the Repub-

lican, Democratic, Socialist, Prohibition, or other political parties, as we customarily know them. But the entire point of the legislation is that the Communist Party acts in other fields as well as in the political arena; and the weapons utilized by the party to attain its objectives are not merely the political techniques protected by the Constitution. The legislation concerns activities of the party in the field of strikes and collective bargaining—not its activities in the political field; it seeks to affect techniques of disrupting commerce and endangering national security—not constitutionally protected political techniques. In no sense, therefore, is Section 9 (h) a regulation of mere political affiliation. An organization or a person, some of whose activities would subject it or him to lawful legislative limitation, cannot escape such regulation because of other activities or beliefs which by themselves would be constitutionally protected. *Prince v. Massachusetts*, 321 U. S. 158; *Jacobson v. Massachusetts*, 197 U. S. 11; *Hamilton v. Regents*, 293 U. S. 245, 267; *Reynolds v. United States*, 98 U. S. 145; *Cleveland v. United States*, 329 U. S. 14, 20; *Stansbury v. Marks*, 2 Dall. 213; *People v. Vogelgesang*, 221 N. Y. 290.

1. If the Communist Party were merely a political party, seeking to elect to office persons it supports and to cause the adoption by lawful means, consistent with our Constitution, of the program it espouses, of course Congress could not



differentiate its members from others in granting access to Board facilities. But events of which this Court should take notice demonstrate that the Communist Party is far more than this—it is an organization one of whose principles is direct action. Extending its scope of activity beyond that normally engaged in by political parties, the Communist Party contemplates not only winning converts to its ideology by speaking, teaching, and persuading, and not only accomplishing governmental changes through the channels of government established by our Constitution. The phase of Communist Party activities with which we are here concerned is the participation of its members in, and the incitement by its agents of, political strikes. The appellants do not and could not successfully contend that political strikes are beyond the power of Congress to prohibit. Such strikes being within the power of Congress to proscribe, then, are quite different from political programs which are to be put into operation through governmental action taken at the behest of voters who have been persuaded to the desirability of the program. Such governmental action is itself constitutionally protected, with the result that belief in such action, though bearing a reasonable relation to the action, cannot be made a basis for classification. But when the action which is to be anticipated from the holding of a certain belief is not constitutionally protected, constitutional guarantees are not infringed.

when that anticipation of action by those holding certain views is made the basis for legislative classification.

The fact that the Communist Party seeks to attain many of its objectives through normal political processes does not prevent government from adopting precautionary legislation with respect to its other activities.

There was ample evidence before Congress that the policy of the Communist Party in this country is to foster by all means the success of Soviet foreign policy even when that policy is in conflict with the policy of the United States. The well-known reversal of the party line of the Communist Party on June 22, 1941, and the parroting of the Soviet opposition to the Marshall Plan by the Communist parties even of the countries to be aided, as well as in the United States, are familiar illustrations. The Communist Party was shown on these occasions to have used its members who were in control of labor organizations operating in areas of vital importance to our economy to accomplish its objectives of furthering Soviet interests whether those interests coincided with, or differed from, the interests of the United States, and no matter how opposed those interests might be to the interests of the union members.

The Communist Party notoriously operates, or attempts to operate, through the control of labor organizations. As appears from the detailed state-

ment (*supra*, pp. 21-48), it has used such control in order to promote Soviet policy, a policy which is, in many respects, hostile to the interest of the United States. The potential effect of strikes by Communist-controlled labor organizations upon the military defense of the United States at critical periods, and upon the present American policy to support the democratic nations in resisting Soviet expansion needs no elaboration. Certainly it must lie within the power of the Government of the United States to prevent labor organizations possessing such power from being dominated by members of an organization which openly is treating the United States as a future enemy.

A regulation aimed at this aspect of Communist activity, by giving labor organizations an incentive to get rid of Communist officers, is obviously related to the safeguarding of the United States against the *conduct* of members of the Party, not against affiliation with the Party or belief in its principles. To the extent that the Communist Party is a political organization, it is left free and unrestrained. Section 9 (h) is thus not concerned with the Communist Party as a political organization. It is properly concerned with other aspects of Communism which Congress may legitimately control in the interest of the United States.

Substantially the same analysis applies to the argument that Section 9 (h) is an attempt to

punish persons having a particular belief. The "belief" in question is a belief in the principles of the Communist Party, or in the overthrow of the Government of the United States by unlawful means.

But such beliefs, however much we may dislike them, were not, as we have shown, the targets of the statute. The Act does not penalize anyone for possessing or expressing them. The target is potential *conduct* which Congress is authorized to exclude from the area of activities protected by the law. Belief and affiliation, it is true, are utilized as the basis for describing the class from whom such potential conduct may be expected. But, as we have shown, *supra*, pp. 21-48), it is the possession of the very beliefs and affiliations named in Section 9 (h) which leads individuals to engage in the conduct which Congress did not desire to protect. Under such circumstances, the Constitution does not inhibit the use of belief and affiliation as a basis for discrimination between those from whom particular conduct may be expected and those from whom it may not.

Here the Act reaches only persons who combine the belief in question with the occupation of a position from which harm is to be expected to a public interest which Congress may legitimately protect. The effort is to prevent persons having such a belief from occupying positions of that sort. The law applies only when there is an

overt act, the holding of a union office, by a person with the belief in question.

A hypothetical example may clarify our position. Assume a group so strongly opposed to private property that it advocates taking whatever one wants wherever one finds it. Although such persons could legitimately form a party for political activity through which a change in the law to permit such conduct would be advocated, a legislature could reasonably prohibit persons having such a belief from being employed as bank guards, or for that matter as bank presidents.

In short, where a belief is likely to cause a person to engage in conduct harmful to the people or the Nation, the legislature may preclude persons of that belief from occupying positions which will enable them to engage in such conduct. The legislature need not wait until the anticipated danger has occurred; it may take reasonable precautions to safeguard the public interest against the reasonable likelihood of danger. To be more specific, Congress need not permit individual Communists to be officers of labor organizations until each individual abuses his position by seeking to bring on a strike which may cripple the United States in the maintenance of its security or in the effectuation of a policy opposed by Soviet Russia. Congress need not leave the barn door open until far more than a horse has been stolen, but may take reasonable anticipatory precautions.



That the Constitution permits regulation of conduct based upon belief when there is reasonable basis to anticipate that a particular belief might lead to conduct which could legitimately be proscribed is shown by the decision of this Court in *In re Summers*, 325 U. S. 561. It was there held that the State of Illinois could, consistently with the First Amendment embodied in the Fourteenth, deny admission to its bar to one, otherwise qualified, who was a conscientious objector to war. This Court took the position that since, in the view of the Illinois Supreme Court, the oath required of applicants for admission to the bar, to support the Constitution of Illinois, carried with it a willingness to perform military service, the applicant's objections to service could be validly treated as a barrier to admission. 325 U. S. at 573.

The rationale of this decision makes clear its direct bearing on the instant case. This Court pointed out that there was no doubt as to the power of Illinois to require military service. 325 U. S. 572. This undoubted power of the State was relevant only as a justification for the requirement that an applicant for admission to the bar swear his willingness to perform such service. Were there no power to require military service, there would be no power to exact an oath fore-swearing the applicant's conscientious scruples against such service. Such scruples are beyond the reach of Government except where they bear

reasonably on conduct which Government can legitimately require. That this is the test is made even more clear by the dissent in the *Summers* case. Mr. Justice Black there said (325 U. S. at 578):

Q I cannot agree that a state can lawfully bar from a semi-public position a well-qualified man of good character solely because he entertains a religious belief which might prompt him at some time in the future to violate a law which has not yet been and may never be enacted. *Under our Constitution men are punished for what they do or fail to do and not for what they think and believe.* [Italics supplied.]

The quarrel of the dissenters in the *Summers* case was not with the view that belief may be deemed relevant to future conduct and may be the basis for governmental restrictions; it was, rather, that it was wholly illusory, on the facts in that case, to relate the applicant's belief to future illegal conduct. Mr. Justice Black said (325 U. S. at 577): "The probability that Illinois would ever call the petitioner to serve in a war has little more reality than an imaginary quantity in mathematics." In the case at bar, on the other hand, the probability that Communist union officers will cause interruptions to commerce by political strikes is one of the most real of our time.

In another very important respect, this case is a much easier one than was the *Summers* case.

For in that case, the position from which Summers was barred (attorney) had no special relationship to military service; attorneys are certainly no more necessary to the armed forces than most citizens in other occupations. But in this case, the position of union officer has a direct, special and peculiar relationship to strikes in interstate commerce.

The *Summers* case is not the only one in which the constitutional admissibility of governmental restrictions which rest on the relationship between present attitudes and future conduct has been recognized. In *Hirabayashi v. United States*, 320 U. S. 81, and in *Korematsu v. United States*, 323 U. S. 214, the war power of Congress was held to justify discriminatory treatment invading the civil rights of persons of Japanese ancestry. The Court held that during war with Japan, Congress and the military authorities could reasonably believe that the danger of sabotage was more likely to stem from persons of Japanese ancestry than from other citizens, and accordingly affirmed criminal convictions for such acts as appearing on the streets after curfew hours and remaining in a "military area," which happened to be the convicted citizens' own home. In these cases, membership in a particular race—a mere accident of birth—was held to justify an inference concerning future conduct and to permit restrictions justifiable only in terms of that inference. There, two steps had to be taken in the process of relat-

ing the restriction imposed to conduct which the government could legitimately prohibit. It had first to be assumed that persons of Japanese ancestry might be ideologically sympathetic toward the then Japanese Government. Only on that assumption was there a belief which could, in turn, be related to seditious conduct. In the case at bar, no such assumption as that involved in the first step taken in the Japanese cases is invited. Congress has not required a union officer to take an oath that he is not a Russian; Congress acted merely on the view that those who in fact believed in Communism might well act in accordance with their beliefs.

2. Having established that it is permissible for Congress to relate belief and future conduct and to impose regulations premised on such a relationship, we proceed now to the question whether it is sufficient justification for a legislative classification based on belief or political affiliation that the belief or affiliation be reasonably related to future conduct or whether there must be a showing that the existence of the belief or affiliation creates a "clear and present danger" of the conduct which it is the legitimate objective of the legislature to proscribe. We think that the authorities discussed below demonstrate that the less stringent test is applicable, although we do maintain (see *supra*, pp. 51-58) that the more stringent is met in this case.

It has long been recognized that the Fifth Amendment, though lacking an equal protection clause, guards against legislation by the Federal Government which either imposes regulations upon, or grants benefits to, certain groups and not others, where the basis for distinguishing between those subjected to the regulation, or entitled to receive the benefits, and those not regulated or benefited, is irrelevant to the legitimate purposes for which the regulation is imposed or the benefit granted. See *Hirabayashi v. United States*, 320 U. S. 81, 100. Because differences of "color, race, nativity, religious opinions, political affiliations," (*American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92), "are in most circumstances irrelevant" to the legitimate purposes for which benefits may be granted or regulation imposed, distinctions based upon such factors are, in most circumstances, "therefore prohibited" by the Fifth Amendment. *Hirabayashi v. United States*, 320 U. S. 81, 100; *Hurd v. Hodge*, 334 U. S. 24. As Mr. Justice Black pointed out, speaking for the Court in *Kotch v. Pilot Commr's*, 330 U. S. 552, 556, "a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having *no rational relation* to the regulated activities," could not be supported under the Constitution. [Italics supplied.]



However, this Court has said that, "it by no means follows" that because the fact of race is "in most circumstances irrelevant" to legislative purposes, even that fact is always irrelevant (*Hirabayashi v. United States, supra*). Alienage, too, has often been held irrelevant to the objects of specific legislation (*Takahashi v. Fish and Game Commission*, 334 U. S. 410), but this Court has said that "it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification." *Clarke v. Deckebach*, 274 U. S. 392, 396. Where factors such as these are deemed to be relevant to the attainment of legitimate legislative policies, their use as a basis for distinction "is not to be condemned merely because in other and in most circumstances [such] distinctions are irrelevant." *Hirabayashi case, supra*, 320 U. S. at p. 101.

The *Korematsu* and *Hirabayashi* cases, *supra*, afford a striking illustration of the distinction between the types of governmental action to which the clear and present danger rule applies and those to which the "rational basis" test applies. In those cases, the Court considered two questions: (1) whether the possibility of sabotage was so grave and imminent a danger to national security as to justify denial to individuals of their fundamental civil rights to freedom of movement and freedom to choose their own place of residence,

and (2) whether Congress and the military authorities could reasonably believe that the evil to be feared was more likely to stem from citizens of Japanese ancestry, than from other classes of citizens. As to the first question, the Court seems to have applied the "clear and present danger" rule. See 320 U. S. at 99, and 323 U. S. at 217-218. The second question was decided pursuant to the "reasonable relation" rule. On this point, in the *Hirabayashi* case, the Court noted that it could not say that with respect to the specific issue involved there was "no ground for differentiating citizens of Japanese ancestry from other groups in the United States." 320 U. S. at 101.

Applying the approach of these cases to the instant case, it becomes apparent that only if Congress had prohibited Communists and believers in violent overthrow of government from holding office in labor unions, as it has not, and only if appellants further established that the right to hold office in labor unions, like the right to leave one's house after 8 p. m., is a fundamental civil right and that government therefore could not impose reasonable limitations upon the classes of persons who may hold such office (but see p. 83, n. 43, *supra*), would the question be presented whether the presence of Communists and believers in violent overthrow of government in such positions gave rise to a clear and imminent danger of substantive evils which would justify such a restriction.

Where distinctions based on race, religion, alienage, or political belief and affiliation are made in regulatory legislation, the question presented is whether these factors are relevant to the particular valid objects of the regulation. Where such distinctions are made, as in the instant case, in connection with the grant of benefits, the sole question presented is whether the factors used are incidental and reasonably related to the particular purposes for which the benefits are properly granted.

In each case in which this Court has upheld discriminatory treatment, it has looked to the relationship between the ground for discrimination and the benefit thereby denied. And a consideration of these cases reveals that relationships far less substantial than that here evidenced have been held sufficient to justify discriminatory treatment. Thus in *United Public Workers v. Mitchell*, 330 U. S. 75, it was held that, in the exercise of its power to promote the efficiency of the public service, Congress could properly bar from public employment persons who exercised their constitutional right to engage in political activity.<sup>4</sup> The Court pointed out that it was

<sup>4</sup> The Court, in passing, quoted Mr. Justice Holmes' classic epigram, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. New Bedford*, 155 Mass. 216, 220 (330 U. S. at 99, note 34). Compare *Crane v. New York*, 239 U. S. 195, 198, and *Clarke v. Deckebach*, 274 U. S. 392, upholding the power of a state to bar aliens from public employment.

sufficient to sustain the legislation that Congress "reasonably deemed" the "cumulative effect" of political activity by government employees an interference "with the efficiency of the public service." 330 U. S. at 101. See also, *Oklahoma v. Civil Service Commission*, 330 U. S. 127, 142-143.

The *Mitchell* case did not turn on the ground that government employment is a privilege which government can grant or withhold on any ground. This Court's opinion expressly recognized that Congress could not constitutionally "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." 330 U. S. 75, 100. The critical distinction between denial of federal employment on grounds such as these and denial on the ground of active participation in political activity is that the former type of affiliations or activities have no relation to the efficiency of the public service; partisan political activity may have. And, since the right to engage in partisan political activity is protected by the First Amendment equally with, for example, the right to affiliate with the Republican Party, the refusal of this Court to test the validity of the regulation in terms of "clear and present" danger demonstrates that legislative classification, even where it is based upon activities or affilia-

tions protected by the First Amendment, is valid unless it is shown that the particular activity or affiliation bears no relation to the legitimate governmental objective which the classification is designed to achieve.

This Court has recognized that Congress has constitutionally excluded anarchists, and could constitutionally exclude Communists, from citizenship (*Schneiderman v. United States*, 320 U. S. 118 at 132, 163, 172); presumably on the theory that belief in anarchy or communism is not unrelated to the question whether an alien would make a good citizen (cf. *Turner v. Williams*, 194 U. S. 279).

But the discrimination against an anarchist is no more directly related to a legitimate congressional objective than is the exclusion of Communist-dominated unions from access to the facilities of the Board.

See also *Friedman v. Schwellenbach*, 159 F. 2d 22 (App. D. C.), certiorari denied, 330 U. S. 838, where

the United States Court of Appeals for the District of Columbia upheld the use of the factors of adherence to the Communist Party line and active participation in organizations dominated by the Communist Party as a basis for denying to individuals the privilege of retaining governmental employment. Such beliefs and affiliations were deemed relevant to the loyalty with which individuals might perform their governmental duties.



Even discriminatory state action, which, unlike Section 9 (h), must satisfy the "equal protection" clause of the Fourteenth Amendment (cf. *Curran v. Wallace*, 306 U. S. 1, 14), has been upheld by this Court where reasonable grounds can be adduced to support the distinction. Thus *In re Summers*, 325 U. S. 561, already discussed (*supra*, pp. 95-97), held that a state may constitutionally deny membership in its bar to persons who, because of religious conviction, refuse to take an oath to bear arms in time of war. *Hamilton v. Regents*, 293 U. S. 245, held that a state may bar from its colleges persons who, for religious reasons, refused to attend classes in military training. *Hawker v. New York*, 170 U. S. 189, held that a state could constitutionally prevent persons who had previously been convicted of a felony from practicing medicine. Cf. *Dent v. West Virginia*, 129 U. S. 114.

Moreover, while a state may not, under the Constitution, arbitrarily ban aliens from lawful occupations (*Truax v. Raich*, 239 U. S. 33; *Takahashi* case, *supra*), it is established that a state may guard against presumed evil propensities of certain aliens by prohibiting all aliens from operating pool halls (*Clarke v. Deckebach*, 274 U. S. 392, 396-397); engaging in the insurance business (*Pearl Assurance Co. v. Harrington*, 38 F. Supp. 411 (D. Mass.), af-

firmed, 313 U. S. 549); shooting wild game or carrying arms used for sporting purposes (*Patson v. Pennsylvania*, 232 U. S. 138), and even from owning land (*Terrace v. Thompson*, 263 U. S. 197; *Porterfield v. Webb*, 263 U. S. 225; *Webb v. O'Brien*, 263 U. S. 313).

Finally, in *Kotch v. Pilot Commissioners*, 330 U. S. 552, it was held that a state could constitutionally deny the right to practice the occupation of river pilot to all except friends and relatives of licensed pilots. Although such a basis for classification would, in most cases, be prohibited by the Constitution, this Court held that because it was not shown that this classification was totally unrelated to the legitimate governmental objective of securing a safe and efficient pilotage system, the legislation as administered was immune from attack.

C. SECTION 9 (H) DOES NOT DENY ACCESS TO FACILITIES AFFORDED BY THE GOVERNMENT FOR THE DISSEMINATION OF INFORMATION ON GROUNDS OF RELIEF

We have shown, *supra*, pp. 81-87, that Section 9 (h) neither illegalizes Communist views or beliefs nor denies to Communists and the like the right to be union officers. We have insisted, rather, that the narrow effect of Section 9 (h) is to withhold the benefits of the National Labor Relations Act from unions whose officers fail to file the affidavits required by that Section. And we have insisted, *supra*, pp. 88-106, that such denial is a regulation

not of belief but of potential conduct—conduct which Congress plainly could proscribe.

The appellants take the view, however, that a showing that there is a reasonable relationship between the evil Congress can combat and any particular views or political beliefs cannot suffice to validate Section 9 (b). They insist that the much more stringent requirement that a clear and present danger be shown is applicable, and that this is shown, beyond peradventure, by the fact that this test has been applied even in cases involving denial of benefits previously granted by government. In support, they cite *Hannegan v. Esquire*, 327 U. S. 146; *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 417 (dissenting opinion); *West Virginia Board of Education v. Barnette*, 319 U. S. 624; *National Broadcasting Co. v. United States*, 319 U. S. 190, 226; and *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536. (Br. 34-35.)

We have already dealt with the significance to this case of this Court's decision in *West Virginia Board of Education v. Barnette*, *supra*. We have shown that this decision and the many others cited by the appellants struck down governmental acts which impinged immediately and directly on religious or political beliefs. See *supra*, pp. 82-85. Appellants seek, however, especially to assimilate the *Barnette* case to that at bar because, they say, that, too, involved an attempted denial of a "privi-

lege" of attending public school, it being a privilege since private schools were available (Br. 34). But as this Court expressly stated, attendance of the public school was "not optional," and *Hamilton v. Regents*, 293 U. S. 245, was expressly distinguished on that ground. 319 U. S. 632. The *Barnette* case, therefore, did not involve a "privilege," but had the effect of penalizing persons of a particular belief (319 U. S. at 629) and hence impinged directly on a civil right.

Other cases cited by appellants only bear a superficial resemblance to this. The *Esquire* decision, the dissent of Mr. Justice Brandeis in the *Milwaukee Publishing* case, the California decision in the *Danskin* case, and the dictum in the *National Broadcasting Co.* case upon which reliance is placed by the appellants, all related to a denial of what may, in a sense, be characterized as a "privilege." In that respect they resemble the situation at bar. But the privileges there afforded by government, unlike the benefits afforded by the Labor Act, were the making available of means for the dissemination of information. *Esquire* and *Milwaukee Publishing* involved the use of postal facilities by magazines and newspapers; the *Danskin* case involved a governmental proffer of school facilities for use as a meeting place but a denial of such facilities to Communists; the *National Broadcasting Co.* case, of course, was concerned with the terms on which the Government could make available radio broadcasting media.

These cases all called for the application of the principle that a government, undertaking to facilitate the dissemination of information or freedom of assembly, cannot pick and choose, without urgent reason for so doing, among the views to be disseminated or the meetings to be held. Under our Constitution, governments have no power to facilitate only the expression of favored views, or meetings of approved groups. But these cases do not suggest that Congress may not impose other conditions on the use of governmental facilities in order to protect the public from injury. *Donaldson v. Read Magazine*, 333 U. S. 178, which also involved restrictions upon the use of the mails, proves the contrary.

But the Labor Act was not a governmental proffer of facilities for the dissemination of information; the Act created an agency for the purpose of promoting industrial peace. The denial of such a governmental facility is not at all comparable, in its relation to First Amendment rights, to the discriminatory denial of radio, meeting or postal facilities, and need not be subject to the same stringent limitations.

D. SECTION 9 (H) DOES NOT REQUIRE A "TEST OATH" AS A MEANS OF SUPPRESSING HERETICAL BELIEFS

Since beliefs and affiliations *per se* are, as we have shown, not the targets of the statute, it follows that appellants' equation of the affidavit provision of the act to the test oaths, which were adopted in England during the Restoration Period



and were carried over to some of the American colonies (Br. 24-25), is wholly inapposite. The test oaths stemmed from the Test Acts,<sup>45</sup> enacted by the English Parliament out of hostility to the Roman Catholics. These Acts required all persons holding any office under the Crown and all members of Parliament to subscribe a declaration against transubstantiation.<sup>46</sup> The test oaths, unlike the affidavit provision here, were clearly an attempt to prescribe what shall be orthodox in belief and involved discrimination against the minority group (the Roman Catholics) solely because of prejudice against its views.

The basic aversion of free men to "test oaths" was articulated in our Constitution in Article VI, which provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The judgment, embodied in Article VI, that religious beliefs can be deemed to have no relationship to conduct in public office can have nothing to do with the congressional judgment that a belief in Communism has a great deal to do with a union officer's propensity for political strikes.

Certainly, the mere requirement of a qualifying oath as to one's views is not proscribed by the Con-

<sup>45</sup> 25 Charles II, c. 2; 30 Charles II, st. 2, c. 1.

<sup>46</sup> See 6 Holdsworth, *A History of English Law* (Methmen & Co. Ltd., London, 1924), pp. 199, 181, 184-185; 2 Channing, *History of the United States* (Macmillan Co., 1937), p. 455.

stitution, as many familiar examples show, and is not in itself an evil." So long as the oath requirement is reasonably related to conduct which the Government can proscribe, as distinguished from views which it cannot, it is within the power of Congress to impose.

Related to the appellants' attack on the requirement of an oath, and their characterization of it as an odious test oath as to belief, is their repeated assertion that Section 9(h) is a product of "unreserved hysteria", a "direct reflection of a widespread and bitter attack upon the civil rights of Americans—an attack which has received an all-

"Article II, Sec. 1, cl. 8 of the Constitution itself prescribes the "Oath or Affirmation" to be taken by the President "before he enter on the Execution of his Office."

This Court requires an oath or affirmation upon admission to its bar. Rule 2 (4).

All federal employees, the President alone excepted, must take the oath prescribed in 5 U. S. C. 16, which includes a promise to "bear true faith and allegiance to" "the Constitution of the United States."

8 U. S. C. 735a: "A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court (1) to support the Constitution of the United States, (2) to renounce and adjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen, (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same."

8 U. S. C. 735b prescribes the precise language of the oath and adds "and that I take this obligation freely without any mental reservation or purpose of evasion."

embracing official sanction", and an attempt to prescribe what shall be orthodox in politics and economics (Br. 92 and *passim*). The short answer to these charges is that "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Sonzinsky v. United States*, 300 U. S. 506, 513-514; *Goesaert v. Cleary*, No. 49, this Term, decided December 20, 1948, slip opinion, p. 3; *Veazie Bank v. Fenno*, 8 Wall. 533, 548; *McCray v. United States*, 195 U. S. 27, 56-59; *United States v. Doremus*, 249 U. S. 86, 93-94; *Magnano Co. v. Hamilton*, 292 U. S. 40, 44, 45. This "Act was not passed because Congress disapproved of the views and beliefs of [the excluded group], but because Congress recognized that \* \* \* persons who entertained [these] views \* \* \* might not use the powers and benefits conferred by the Act for the purposes intended by Congress." *United Steel Workers v. National Labor Relations Board*, *supra*, 170 F. 2d at 264.

In *United States v. Schneider*, 45 F. Supp. 848, 850 (E. D. Wis.), District Judge Duffy held unconstitutional a statutory provision denying work relief to Communists on the ground that "There is no necessary or logical connection between the political or social beliefs of a person and his distress." But where, as here, there is a "necessary \* \* \* connection" between membership in or support of the Communist Party, or belief in violent overthrow of government, and the uses to which the powers of

union office may be put, Congress is not precluded by the Constitution from utilizing those facts as a basis for classification. Freedom of political belief or affiliation does not preclude Congress from taking cognizance of tendencies to conduct which may stem from the possession of particular beliefs or affiliations. The doctrine of freedom of belief and affiliation may not be used to blind legislatures to facts of common knowledge, or to preclude legislatures from properly exercising their constitutional power in the public interest.

#### IV

##### SECTION 9 (H) IS NOT UNCONSTITUTIONALLY INDEFINITE

Appellants contend (Br. 66-74) that Section 9 (h) is unconstitutional because the facts which union officers are required to aver as a condition to obtaining the benefits of the Act are vague and indefinite. Appellants do not suggest that a union officer would have any difficulty in knowing whether or not he was "a member of the Communist Party" or that "he does not believe in, and is not a member of \* \* \* any organization that believes in or teaches, the overthrow of the United States Government by force \* \* \*". The attack is directed at his knowledge of whether he was "affiliated with" the Communist Party, whether he "supports" an organization anxious to overthrow the Government, and whether such overthrow was to be sought by "unconstitutional methods." Whether these phrases are so indefinite as to re-

quire the invalidation of Section 9 (h) on that ground is a question which can properly be answered only after an analysis of the words themselves in the light of the facts that only wilfully false statements in the affidavits are punishable (see pp. 116-120, *infra*), and that no one has suggested words which, though more incisive, could accomplish the legitimate ends Congress sought to attain.

The expressions "affiliated with" and "supports" are common words whose meaning is generally known, although there will, of course, be a question as to their application to particular borderline situations.\* We think there can be even less question as to the definiteness of the expression "unconstitutional methods", when used in relation to the overthrow of the Government of the United States. Obviously, the only constitutional method is by amendment to the Constitution—or, if the "overthrow of the Government" is directed merely at the persons holding office in it at a particular time, by replacing them through the peaceful processes of free elections.

The fact that there may be cases in which the applicability of Section 9 (h) is somewhat doubtful does not render the statute unconstitutionally indefinite. Men ordinarily speak in words which lack a mechanical precision of denotation. There will be found around almost every statute an in-

\* As to the meaning of "affiliates", see *Bridges v. Wixon*, 326 U. S. 135, 141.



evitable fringe of uncertainty and doubt. This periphery of indefiniteness may be more extensive in some cases than in others but its existence is ordinarily inescapable.

Furthermore, as this Court has several times noted (even in a case involving the death penalty), "in most English words and phrases there lurk uncertainties." *Robinson v. United States*, 324 U. S. 282, 286. "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but not one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash v. United States*, 229 U. S. 373." *United States v. Wurzbach*, 280 U. S. 396, 399.

A statute will therefore not be found constitutionally indefinite because of the possibility of doubt in peripheral cases. If there is a hard core of circumstances to which a statute will unquestionably apply, as to which the ordinary person would have no doubt as to its application, and if this constitutes the mass of situations with which the act deals, constitutional requirements are fulfilled.

That Section 9 (h) is a statute of this sort, despite doubts which may arise in borderline situations, is demonstrated by the fact that literally thousands of officers of labor organizations have, since the passage of the Act, filed the affidavits contemplated by Section 9 (h) without apparent qualms concerning the truth of their assertions.

This Court has recently stated: "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *United States v. Petrillo*, 332 U. S. 1, 7; *Robinson v. United States*, 324 U. S. 282, 285-286. In the *Petrillo* case, it was recognized that this was particularly true when more specific language suitable to carrying out the legislative purpose was difficult to suggest. In the *United Steel Workers* case, the Court of Appeals for the Seventh Circuit properly observed that Section 9 (h) is "as specific as the nature of the problem permits." 170 F. 2d at 266.

In any event, we are not faced with the necessity of determining the definiteness of the phrases in question in the abstract. Affiants under Section 9 (h) are protected against punishment so long as they act in good faith. The sole penalty provided for the filing of false affidavits under Section 9 (h) is prosecution under Section 35 (A) of the Criminal Code (18 U. S. C. 80). That Section provides criminal penalties for "knowingly and willfully" making fraudulent or fictitious statements to any agency of the Federal Government. Clearly, no affiant could successfully be prosecuted under this Section for filing a false affidavit under Section 9 (h) unless it could be proved that he knowingly lied in making the averments contained in his affidavit.

Inasmuch as only wilfully false statements are punishable, the statute establishes a subjective test, the understanding of the affiant himself. As the lower courts have held, "A union official is simply asked to say whether he is 'affiliated'; i. e., whether he considers himself as affiliated. We may safely assume that any man intelligent and schooled enough to be chosen as a union official will be familiar with the word 'affiliated' and will have a definite idea of its meaning. His notion of the word's significance may not coincide with that of another, and may not be what a dictionary gives. But he is not called upon to define 'affiliated' in his affidavit. He is asked to say whether he considers himself affiliated in the sense in which that word has significance to him. There is no vagueness or uncertainty in his own personal definition." <sup>40</sup>

Section 9 (h) "requires only that persons who knowingly engage in the activities set forth in Section 9 (h), or who knowingly believe in the enumerated doctrines, or who knowingly support organizations which disseminate such doctrines, shall not obtain access to the machinery set up by Congress for the purpose of advancing a specific public policy; hence if an affiant honestly believes that he is not affiliated with the Communist Party, that he does not support any organization which to his knowledge teaches the overthrow of the United States Government by means which he knows to be

<sup>40</sup> *National Maritime Union v. Herzog*, 78 F. Supp. at 172.

illegal or unconstitutional, such an affiant would be in no danger of conviction under Sec. 35 (A) of the Criminal Code." <sup>20</sup>

This Court has declared that "The constitutional vice" in an indefinite statute "is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. See *United States v. Cohen Grocery Co.* [255 U. S. 81]. But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws v. United States*, 325 U. S. 91, 101-102. As a consequence, in no case in which *scienter* was clearly made an element of the offense has the Court held a statute invalid for indefiniteness. <sup>21</sup> Conversely,

<sup>20</sup> *United Steel Workers v. N. L. R. B.*, 170 F. 2d at 266-267 (C. A. 7).

<sup>21</sup> Section 4 of the Lever Act was held invalid in *United States v. Cohen Grocery Co.*, 255 U. S. 81; *Weeds, Inc. v. United States*, 255 U. S. 109; and *Small Co. v. American Sugar Ref. Co.*, 267 U. S. 233. The statute as quoted in 255 U. S. at 86 reads as though intent were required. But the



in many cases the Court has clearly indicated that the presence of such a requirement removes any question as to an act's validity. *United States v. Ragen*, 314 U. S. 513, 523-524; *Gorin v. United States*, 312 U. S. 19, 27-28; *Screws v. United States*, 325 U. S. 91, 101-105; *Omaechevarria v. Idaho*, 246 U. S. 343, 348; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 502-503; *United States v. Petrillo*, 332 U. S. 1; cf. *Winters v. New York*, 333 U. S. 507, 519.

Appellants urge, citing *Winters v. New York*, 333 U. S. 507, that a higher standard of definiteness is required when a statute impinges against First Amendment freedoms. Our first answer to this

full text of the Section, as set out in 255 U. S. at 81-82, shows that intent was no part of the clauses under attack.

The accumulation of statutes held invalid in *International Harvester Co. v. Kentucky*, 234 U. S. 216, and *Collins v. Kentucky*, 234 U. S. 634, was construed by the state court to make unlawful any combination "for the purpose or *with the effect of fixing a price that was greater or less than the real value of the article*" (234 U. S. at 221). [Italics added.]

The statute condemned in *Herndon v. Lowry*, 301 U. S. 242, did not in terms require intent, but, as construed by the state court, punished the attempt to incite insurrection, if force was contemplated by the inciter "at any time within which he might reasonably expect his influence to continue" (310 U. S. at 254-255). The statute as thus construed might be thought to require either (1) an intent to stimulate force and violence, or (2) an intent to utter words which "might, at some time in the indefinite future" (301 U. S. at 262) lead to force and violence. It is clear that this Court adopted the latter construction, and thus assumed that the statute reached a person, "however peaceful his own intent" (301 U. S. at 262).



contention is that, for reasons already stated, pp. 81, *et seq.*, *supra*, Section 9 (h) does not. It does not punish for thinking, saying, speaking, assembling, or for anything else protected by the First Amendment. There is thus no occasion in these cases for the special solicitude reserved for cases which, like *Winters* itself, involve laws restricting these freedoms.

But apart from this, even in the field of First Amendment rights, a statute will not be found unconstitutionally indefinite where *scienter* is an element of the offense. For where the press, speech and assembly are involved, as in other situations, the necessity of a willful violation serves to remove the danger that a person will be punished for conduct which he would not know was illegal. We think this Court so recognized in the *Winters* case itself, when it pointed out that in the statute there under consideration, "no intent or purpose is required". 333 U. S. at 519. And no case suggests the contrary.

One additional observation is pertinent. The requirement that a statute not be vague or indefinite applies only where the statute exacts "obedience to a rule or standard" (*Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210, 243) which either "forbids or requires the doing of an act" (*Connally v. General Construction Co.*, 269 U. S. 385, 391). Section 9 (h) does neither. No one is required to execute the affidavits contemplated by that Section, and thereby to subject himself to even

the possibility of punishment. No one is prohibited from engaging in the activities set forth in that Section, or from believing in the doctrines enumerated. The statute requires only that persons who knowingly engage in such activities, or knowingly believe in the enumerated doctrines, or knowingly support organizations which disseminate such doctrines, shall not obtain access to the machinery set up by Congress for the purpose of advancing a specific public policy, and shall not through willful misrepresentation attempt to obtain benefits barred to them.

## V

### SECTION 9 (H) IS NOT A BILL OF ATTAINDER

The appellants' contention (Br. 82-92) that Section 9 (h) is invalid as constituting a bill of attainder within the meaning of Art. I, Sec. 9, cl. 3 of the Constitution is, in essence, merely another form of statement of its general contention that Section 9 (h) regulates unorthodox belief, as opposed to the Government's view that Section 9 (h) regulates potential conduct by denying access to Board facilities to persons whose views create a likelihood that they will misuse those facilities.

Section 9 (h) imposes no punishment; it does not even describe qualifications for union office. What it does do is to impose conditions on a union's right to the benefits accorded by the National Labor Relations Act as a means of reducing obstructions to commerce caused by strikes. So viewed, Section

9 (h) contains nothing like the legislative determination of guilt and the legislative punishment which are the characteristics of a bill of attainder. *United States v. Lovett*, 328 U. S. 303.

But even assuming, *arguendo*, that Section 9 (h) may be construed as a denial of the right to hold union office, it is, nevertheless, not a bill of attainder. This Court has, on several occasions, upheld the constitutional validity of statutes prescribing qualifications for public office or for practicing a profession, even though they operate to disqualify an incumbent who was unable to meet the prescribed qualifications. *Hawker v. New York*, 170 U. S. 189 (statute disqualifying from medical practice persons convicted of a felony before its enactment); *Dent v. West Virginia*, 129 U. S. 114 (statute requiring proof of graduation from reputable medical school as condition on <sup>medical</sup> ~~legal~~ practice); *Clarke v. Deckebach*, 274 U. S. 392 (aliens disqualified from operating pool rooms); *Heim v. McCall*, 239 U. S. 175 (aliens disqualified from public employment); *Crane v. New York*, 239 U. S. 195 (same); see also *Ex parte Wall*, 107 U. S. 265; *Ex parte Curtis*, 106 U. S. 371. And in both *Cummings v. Missouri*, 4 Wall. 277, 319, and *Ex parte Garland*, 4 Wall. 333, 380, this Court, though striking down the enactments in question as constituting bills of attainder, recognized the power of government to impose qualifications. The question on which the Court divided in those cases was simply whether the enactments there involved did, in fact, impose

qualifications or punishment. Thus, in *Cummings*, the Court said: "It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions." 4 Wall. at 319. Compare *In re Summers*, 325 U. S. 561, discussed *supra*, pp. 95-97.

Here we are concerned with the function of acting as officer of a collective bargaining agent. The "rights and duties given to the sole bargaining agent [are] highly fiduciary." *National Maritime Union v. Herzog*, 78 F. Supp. at 172. See *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; *Wallace Corp. v. National Labor Relations Board*, 323 U. S. 248. And the same must obviously be true as to the officers through whom the bargaining agents act. This Court has compared the function of the bargaining agent to those of government itself. *Steele v. Louisville & Nashville R. Co.*, 323 U. S. at 198; *Wallace Corp. v. National Labor Board*, 323 U. S. at 255; *J. I. Case Co. v. National Labor Relations Board*, 321 U. S. 332, 335.

Plainly, "the qualifications of a person exercising quasi governmental functions may be prescribed by the sovereign. Congress clearly has the right to assure the minority of the workers, who are represented against their choice by the agent, and the employer, who must deal with the agent to

the exclusion of others, that the agent possesses minimum qualifications for the post." (*National Maritime Union v. Herzog*, 78 F. Supp. at 173.) And Congress has the power to impose qualifications designed to protect the general public interest as well. That interest may be imperiled if labor union officials subscribe to a philosophy which openly advocates using labor organizations and their strike weapon as a means of undermining the policies of this Government in relation to other nations and our form of Government itself.

A measure imposing qualifications for holding office or following a particular vocation is thus not within the interdiction of Art. 1, Sec. 9, cl. 3, unless it is such only in form and is, in fact, a punishment. But, as stated in *United Steel Workers v. National Labor Relations Board*, *supra*, 170 F. 2d at 267, "Section 9 (h) does not rest upon any finding of guilt" and, certainly, imposes no punishment on the basis of such a finding. This is made clear by all that we have already said in the course of this brief. But the matter is put beyond doubt by comparing Section 9 (h) with the enactments stricken in the *Cummings*, *Garland* and *Lovett* cases.

In all of these "bill of attainder" cases, the enactments held invalid operated as a permanent disqualification. In all, those against whom the enactments were directed could never qualify while the laws stood. Lovett would have been barred from the federal service even though his views were wholly altered in later years; Cummings could never



preach and Garland could never appear in this Court though they deeply repented their affiliation with, or support of, the Confederacy. On the other hand, nothing in Section 9 (h) prevents a union officer from, at any time, filing the qualifying affidavit. Indeed, a proposed amendment which would have foreclosed a change in heart was rejected on the specific ground, stated by Congressman Hartley, that "I do not want to deprive one who has seen the light and who has made an honest reform of the right to be a member of a labor organization." 93 Cong. Rec. 3627. While permanency of disqualification does not *per se* convert a qualification requirement into a punishment (cf. *Hawker v. New York*, *supra*, 170 U. S. 189), the absence of permanency is certainly persuasive that the enactment is not penal.<sup>52</sup>

An analysis of the statute involved in the *Lovett* case (Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431) also provides a revealing insight into the difference between a bill of attainder and a qualifying statute. Section 304, the provision stricken in that case, bore no relation to a measure fixing qualifications for federal office. This is shown by contrasting it with Section 301 whose validity has been unquestioned and which, not unlike Section 9 (h) here involved, provided that no part of the

<sup>52</sup> The line between civil and criminal contempts, based on the familiar distinction drawn between remedial and penal measures, may supply a helpful analogy. *Penfield Co. v. S. E. C.*, 330 U. S. 585, 590, and cases cited.

appropriation could be used to pay the salary of any person "who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence." That section, like Section 9 (h), and unlike the stricken Section 304, operated equally upon all persons and expressed the judgment of Congress that anyone who advocates the overthrow of the Government by force or violence is not qualified for Government service.

#### CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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## APPENDIX A

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

### FINDINGS AND POLICY

**SECTION 1.** The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce \* \* \*

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working

conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

#### DEFINITIONS

SEC. 2. When used in this Act—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

#### RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

**SEC. 8.** It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

#### **REPRESENTATIVES AND ELECTIONS**

**SEC. 9. (a)** Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: \* \* \*

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective



bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

2. The pertinent provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141 *et seq.*) are as follows:

#### SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

## **TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT**

**SEC. 101.** The National Labor Relations Act is hereby amended to read as follows:

### **“FINDINGS AND POLICIES**

**“SECTION 1.** The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or

unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organ-

izations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

#### “DEFINITIONS

“SEC. 2. When used in this Act—

• • • • •

“(3) The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse,



or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

\* \* \* \* \*

#### "RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

#### "UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

\* \* \* \* \*



"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

\* \* \* \* \*

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: \* \* \* (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

\* \* \* \* \*

#### "REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees

shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

“(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is af-

filiated directly or indirectly with an organization which admits to membership, employees other than guards.

“(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

“(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

“(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

“(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the

identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

“(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

“(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

“(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

\* \* \* \* \*

“(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor

organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

“(1) the name of such labor organization and the address of its principal place of business;

“(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

“(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

“(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

“(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

“(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;



and (B) can show that prior thereto it has—

“(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

“(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

“(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

“(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition

under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

\* \* \* \* \*

#### BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, han-

dling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer); if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

## APPENDIX B

The following labor organizations bar Communists from office.

### A. F. L.

Communists may not hold international or local office in the 16 unions listed below. In the first 11 unions listed, this prohibition results from constitutional clauses barring Communists from membership and, as a consequence from office. The next 4 unions apply the bar to international and local office-holding *per se*, but have no clause specifically covering membership alone. The last union covers international officers only.

Name	Date of constitution	Page
Bridge & Iron Workers .....	1944	5
Railway Clerks .....	1947	121-122
Retail Clerks .....	1947	10
Teamsters .....	1947	6-7
Telegraphers .....	1943	32
Chemical Workers .....	1947	4
Coopers .....	1947	28
Distillery Workers .....	1946	7
Glass Bottle Blowers .....	1946	4
Printing Pressmen .....	1940	83
Farm Labor .....	[1948]	4
Hatters .....	1948	20, 44
Hotel Workers .....	1947	9
Automobile Workers .....	1945	8
Upholsterers .....	1946	40, 136
Seafarers .....	1944	10

<sup>1</sup>These constitutions are filed with the Affidavits Compliance Branch of the N. L. R. B. as being currently (December 1948) in effect; the date in brackets is for one undated on its face. In all, the constitution of 100 A. F. L. unions were examined. According to the B. L. S. "Directory of Labor Unions" (Bull. 937, p. 3) the A. F. L. had 105 affiliates at the beginning of 1948.

### C. I. O.

Communists may not hold international or local office in the 9 unions listed below. In the first 4 unions listed this prohibition results from constitutional clauses barring Communists from membership and in consequence from office. The last 5 unions apply the bar to international and local of-



office-holding *per se*, but have no clause specifically covering membership alone.

Name	Date of constitution <sup>1</sup>	Page
Oil Workers.....	1947	4
Rubber Workers.....	1946	35
Utility Workers.....	1946	9
Woodworkers.....	1945	1-3
Steelworkers.....	1948	5
Marine & Shipbuilding Workers.....	1944	8
Plaything & Novelty Workers.....	1946	14
Automobile Workers.....	1947	23
Textile Workers.....	1946	12

<sup>1</sup> These are the constitutions filed with the Affidavit Compliance Section as being currently (December 1948) in effect. In all, the constitutions of 35 C. I. O. unions were examined. According to the BLS "Directory of Labor Unions" (Bull. 937, p. 3) the C. I. O. had 40 affiliates at the beginning of 1948.

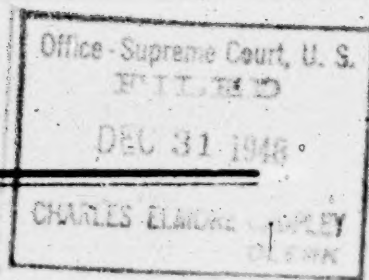
### INDEPENDENTS

Communists may not hold international or local office in the 10 unions listed below. In the first 5 unions listed, this prohibition results from constitutional clauses barring Communists from membership and in consequence from office. The next 4 unions apply the bar to international and local office-holding *per se*, but have no clause specifically covering membership alone. The last union covers international offices only.

Name	Date of Constitution <sup>1</sup>	Page
International Guards Union of America.....	[1948]	2
International Guards & Watchmens Association.....	[1948]	5
Guards & Watchmen, Inc.....	1947	6
United Aircraft-Welders of America.....	1946	2
United Mine Workers of America.....	1944	49
Gulf States Employees Association.....	[1948]	1
American Watch Workers Union.....	[1948]	Art. VIII Sec. 1 (4)
Associated Unions of America.....	1946	16
Plant Guard Workers of America.....	1948	5
Interstate Metal Workers.....	1947	2

<sup>1</sup> These constitutions are filed with the Affidavit Compliance Section as being currently (December 1948) in effect; the dates in brackets are for those undated on their face. The United Mine Workers had not filed its constitution with the Board. The information is based upon the latest copy of its constitution on file in the Board's library. In all, the constitutions of 60 independent unions were examined.

**LIBRARY**  
**SUPREME COURT. U. S.**



IN THE  
**Supreme Court of the United States**

OCTOBER, ~~1948~~ TERM

147  
No. ~~638~~ 10

AMERICAN COMMUNICATIONS ASSOCIATION, CIO,  
JOSEPH P. SELLY, ETC., ET AL.,  
*Appellants,*  
vs.

CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL  
DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD,  
SECOND REGION.

**BRIEF OF NATIONAL LAWYERS' GUILD  
AS AMICUS CURIAE.**

NATIONAL LAWYERS' GUILD,  
ROBERT W. KENNY, of Los Angeles,  
*President.*  
ROBERT J. SILBERSTEIN,  
of Washington, D. C.,  
*Executive Secretary.*

By RICHARD F. WATT,  
of Chicago,  
*Chairman, Labor Law Committee,*  
and  
EDMUND HATFIELD,  
of Chicago,  
*Attorneys for National Lawyers' Guild.*

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IN THE  
**Supreme Court of the United States**

OCTOBER, 1948, TERM

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**No. 336**

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AMERICAN COMMUNICATIONS ASSOCIATION, CIO,  
JOSEPH P. SELLY, ETC., ET AL.,

*Appellants,*

vs.

CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL  
DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD,  
SECOND REGION.

---

**BRIEF OF NATIONAL LAWYERS' GUILD  
AS AMICUS CURIAE.**

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**PRELIMINARY STATEMENT.**

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This brief is submitted on behalf of the National Lawyers' Guild as *amicus curiae*. The National Lawyers' Guild throughout its existence has been actively concerned with the preservation and strengthening of the fundamental rights and liberties guaranteed by the Constitution of the United States. It therefore seeks to make known its position here.

In this case the Court is confronted with constitutional issues of the utmost gravity and national importance.

These constitutional issues are presented by Section 9(h) of the Labor-Management Relations Act of 1947—popularly known as the Taft-Hartley Act. Section 9(h) requires the filing of so-called non-communist affidavits by officers of labor organizations as an indispensable condition to use by their organizations of the facilities of the National Labor Relations Board.

It is the considered judgment of the National Lawyers' Guild that Section 9(h) constitutes a serious abridgment of the constitutionally protected rights of freedom of thought, conscience, speech and assembly, of so novel, far-reaching and grave a character as to be of the utmost national consequence.

## ARGUMENT.

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### I.

**Section 9 (h) of the Labor-Management Relations Act of 1947 Is a Bill of Attainder and Therefore Violates Article I, Section 9 of the Constitution.**

Article I, Section 9 of the Constitution provides unequivocally and in absolute terms: "No Bill of Attainder \* \* \* shall be passed." A bill of attainder is a legislative enactment, no matter what its form, that applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment without judicial trial. *United States v. Lovett*, 328 U. S. 303.

Although bills of attainder have fortunately not been frequent in our history, the danger they constitute is so very great that vigilance against them must never be relaxed. The *Federalist* (No. 44) denounced them as contrary to the first principles of the social compact and to every principle of sound legislation. By means of a bill of attainder a legislative majority, operating under conditions approaching hysteria, can punish unpopular persons or groups without hearing, without opportunity for defense, without any of the safeguards of due process of law whatsoever. As Justice Story observed:

"Bills of this sort have most usually been passed in England in times of rebellion, or gross subserviency to the Crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others." Comm. sec. 1344.

Section 9(h) of the Labor-Management Relations Act of 1947—popularly known as the Taft-Hartley Act—is beyond question a bill of attainder. It applies to an ascertainable group—members of the Communist Party and persons “affiliated” with it. Without judicial trial it by legislative fiat inflicts punishment on persons belonging to this group, the punishment imposed by Section 9(h) consisting in deprivation of the opportunity to hold positions of leadership and trust as officers of labor unions.

Exclusion from any of the professions or of the ordinary vocations of life for conduct is punishment. As this Court stated in *Cummings v. Missouri*, 71 U. S. 277, 321, 322:

“The theory upon which our political institutions rests is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.”

It is significant that in each of the three leading cases striking down bills of attainder—*United States v. Lovett*, 328 U. S. 303, *Cummings v. Missouri*, 71 U. S. 277, and *Ex parte Garland*, 71 U. S. 333—the punishment imposed by legislative action consisted in barring certain named persons or members of a class from a profession or positions of employment.

Being an officer of a labor union is assuredly one of the recognized vocations of life. Among a very large section of the populace this vocation is held in highest esteem. Many union officers have given long years to the service of their organization and its members and have acquired especial skill therein. Often they have been away from

the practice of their original craft or industrial occupation so long as to have lost all skill and dexterity in it.

The purpose of Section 9(h) is only too clear. Congress intended to drive Communists from positions of responsibility in the labor movement. The National Labor Relations Board has itself so construed the provision in determining the cardinal question of whether or not the officers of the parent bodies, the A. F. L. and the C. I. O., need comply:

"The assumption is that if the facts are known through this filing procedure, union members . . . will soon remove Communists from leadership rather than allow themselves to be precluded from enjoying the benefits of the Act."—*Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. No. 2.

The pressure on non-complying unions and their members is tremendous. In elections held by the Board to determine collective bargaining agents, names of non-complying unions cannot appear on the ballot. They are powerless to seek redress for unfair labor practices committed by employers or other unions. Unless their officers sign they are, to all intents and purposes, outlaws—fair game for employer or rival union. It is no accident that despite their bitter opposition to Section 9(h) the overwhelming majority of unions have complied and that unions which did not comply are increasingly being forced to do so.

That the process of removing Communists from official positions in the labor movement is somewhat indirect does not render it any the less effective. When a union complies, union officers who cannot or will not sign the required affidavit lose their positions. They are effectively barred from union office. The punishment follows immediately upon the refusal to sign the expurgatory oath.

The majority of the three-judge district court below in



holding Section 9(h) valid adopted the reasoning of the majority of the three-judge district court in *National Maritime Union v. Herzog*, 78 F. Supp. 146 (D. C., D. C.; June 21, 1948), subsequently affirmed by this Court without consideration of the question of the validity of Section 9(h), 68 S. Ct. 1529. The bill of attainder argument was there disposed of by Judge Miller, writing for the majority, on the ground that "it is not punishment to withhold the grant of a privilege from one who cannot or will not meet the valid conditions upon which it is afforded." (164)

Such reasoning is, we submit, unrealistic. The privilege withheld—the privilege of using the facilities of the National Labor Relations Board—if that is only a privilege—is a *privilege available to unions and the employees whom they represent*. But the vice of Section 9(h) as a bill of attainder is its *punishment of union officers*. This distinguishes the instant case from the several decisions upholding the validity of legislative imposition of conditions upon the pursuit of a specified profession or employment. The strongest of these cases is probably *United Public Workers v. Mitchell*, 330 U. S. 75, where the majority of a closely divided court held constitutional the Hatch Act forbidding government employees to engage in political activity, admittedly a right protected by the First Amendment. There the favor bestowed was governmental employment, and the persons in question had the choice between accepting the favor and foregoing the right to engage in political activity, or in declining the favor and exercising the right. There the condition attached to the privilege could be met at the discretion of the person who sought to become the recipient of the favor. But here discretion as to the exercise of the "privilege" is lodged not in the person whose occupational rights are impaired, who is punished, but in others—the union and its members.

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It is absurd to attempt to equate the instant situation with the constitutional power of a State to bar persons previously convicted of a felony from the practice of a profession, which is affirmed in such cases as *Hawker v. New York*, 170 U. S. 189.

As was noted in the dissenting opinion of Judge Major in *Inland Steel Company v. N. L. R. B.*, 170 F. (2d) 247 (C. C. A. 7th; September 23, 1948), the other leading case concerned with the validity of Section 9(h), the legislative history of the Act demonstrates—and it was so admitted in the brief filed by the Board in that case—that Congress recognized that some labor organizations with Communist officials were willing and able to cooperate in effectuating the policies of the Act, but that despite this the Congress placed such Unions in the same category with those whose officials were unwilling to do so, and denied to each class alike the benefits and facilities which Congress had provided. Judge Major remarked:

“The legislative fire . . . was not directed merely at those whom it intended to disable. The range included a scope of far greater area. It encompassed what it recognized as good Communists as well as the bad. And of more importance it included countless patriotic employees and Union officials who carried no taint of Communism. All alike were made to suffer the same fate and required to answer for the sins of a few, even one.” (261)

It is not surprising, therefore, that one of the principal studies of Section 9(h) finds that “Perhaps the most conspicuous trait of the provision is that it is clearly a ‘bill of attainder.’” Barnett, “The Constitutionality of the Expurgatory Oath Requirements of the Labor-Management Relations Act of 1947” 27 Ore. L. Rev. 85, 88 (1948).

To sum up, even though the Congress has power to impose certain conditions on the use of the Board's facili-

ties, it cannot impose conditions which operate, even though circuitously, to punish by legislative fiat without judicial trial members of an ascertainable class.

*Oyama v. California*, 332 U. S. 633, 636:

"In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect."

The pattern of expurgatory oath embodied in Section 9(h) could, if permitted to continue, be followed to bar millions of citizens whose political views are unpopular from any and all kinds of gainful employment. Recently there have been localized instances of industrial workers being given this arbitrary "sign the oath or else" treatment, on pain of loss of employment and blacklisting in the community. In the highest levels of the motion picture industry, a tendency in the same direction is observable. School teachers, lawyers—even corporation executives, travelling salesmen and farmers—may be next.

The National Lawyers' Guild urges this Court to strike down Section 9(h) for what it is—a thoroughly reprehensible bill of attainder.

## II.

**Section 9 (h) Violates the Most Fundamental of All Freedoms—Freedom of Thought and Conscience—Guaranteed by the First Amendment.**

The words of Mr. Justice Jackson in *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 642, are already classic:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

No one can candidly deny that Section 9(h) is designed to compel the disclosure of political belief and opinion. In the very words of the Board itself in *Northern Virginia Broadcasters, Inc.*, 75 N. L. R. B. No. 2, it is "Pressure . . . to stand up and be counted." It is true that union officials are not thereby forced to declare their political philosophy and affiliations under pain of imprisonment. But union officers by Section 9(h) are given a clear alternative: to comply by permitting this invasion of the privacy of their personal convictions or, according to the analysis of Section 9(h) made by the National Labor Relations Board itself, to invite being driven from office as a consequence of their refusal to comply. Exclusion from the recognized vocation of being a labor union officer is, as has been shown above, punishment. And to compel action under pain of punishment is coercion.

Thus the 80th Congress imposed, under the guise of regulating commerce, a political and intellectual orthodoxy for union officers. The test of orthodoxy is the so-called non-communist affidavit, by which the individual swears that he is not a member of the Communist Party or affiliated with that party and *that he does not believe in* and is not a member of or supports any organization that believes or teaches the overthrow of the government by force or by any illegal or unconstitutional method.

It is important to note that the affidavit proscribed requires an oath that one does not believe in certain things. As was noted by Mr. Justice Murphy in his dissenting opinion in *Jones v. City of Opelika*, 316 U. S. 584, 618, which subsequently became a majority opinion of this Court in 319 U. S. 103:

"Freedom of speech, freedom of the press, and



freedom of religion all have a double aspect—freedom of thought and freedom of action. Freedom to think is absolute of its own nature.”

Despite the law against seditious acts, simple belief in the desirability of the overthrow of the government is not illegal. It is of course well known that Thomas Jefferson considered a revolution now and then highly desirable. He even wrote, perhaps in jest, but surely as expressing his convictions if only by way of hyperbole:

“God forbid we should ever be twenty years without such a rebellion. . . . What signify a few lives lost in a century or two. The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure.” (Letter to Wm. S. Smith, 1787.)

Abraham Lincoln, in his First Inaugural Address, gave us these oft-repeated words:

“This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it.”

The orthodoxy which the 80th Congress sought to impose by means of Section 9(h) is not concerned with what one may do or say. *The orthodoxy of Section 9(h) relates to what one may think.* Section 9(h) is thought control for union officers and would-be union officers.

Under the Bill of Rights belief is not subject to restriction, no matter how unpopular the particular belief may be. The thoughts, opinions, beliefs, faith, conscience of each individual are inviolable—they cannot be invaded or even pried into by agents of government; they cannot be forced into the open through such a device as the expurgatory oath; they cannot be punished. *West Virginia Board of Education v. Barnette*, 319 U. S. 624; *Stromberg v. California*,



283 U. S. 359. Indeed, the words of this Court in *Cummings v. Missouri*, 71 U. S. 277, 318, condemn Section 9(h) no less than the test-oath involved in that case:

"The oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires, and sympathies, also."

Outraged by this assault on their personal liberties, outstanding union leaders noted for their anti-Communism have refused to comply.

It should be noted, furthermore, that under Section 9(h), if one officer of a union were in good faith to swear that he is a member of the Communist Party, but does not believe in overthrow of the United States Government by force or other illegal or unconstitutional means, his union would be denied recourse to the facilities of the Board. This would occur despite the fact that the Communist Party, though subject to widespread hostility and profound antipathies, is a legal political party, which in some places in the United States not only runs candidates for public office, but occasionally succeeds in electing them. As a political party it enjoys, together with its members, all the rights which every other legal political party enjoys. *Communist Party v. Peck*, 20 Cal. (2d) 536, 127 P. (2d) 889; *Feinglass v. Reinecke*, 48 F. Supp. 438.

In the perspective of constitutional law, to make a labor union's access to the facilities of the National Labor Relations Board conditional upon its officers' filing affidavits that they are not members of the Communist Party is no more valid than it would be to make it conditional upon their filing affidavits that they are not members of the Democratic Party or the Republican Party.

The system of democratic liberties we prize so highly cannot long survive this forcing men to disclaim "dangerous thoughts". Indeed, John Milton placed at the very

beginning of his "Areopagitica", which is one of the primary sources of our constitutional liberties, the following quotation from Euripides:

"This is true liberty, when free-born men  
Having to advise the public may speak free,  
Which he who can, and will, deserves high praise,  
Who neither can nor will may hold his peace;  
What can be juster in a State than this?"

The 80th Congress has flouted the First Amendment in enacting Section 9(h). It is, we submit, the solemn duty of this Court, painful though it be, to correct this grave error.

### III.

#### **Section 9 (h) Violates the Constitutionally Protected Freedom of Workers to Assemble in Unions, and to Select Officers of Their Own Choosing.**

Free speech and free assembly are of the very essence of the rationale of labor organizations, which have been formed out of the necessities of the employer-employee relationship in modern society. Such associations of individuals for a common purpose are expressions of the rights of free speech, press, assembly and petition, thought and conscience guaranteed by the First Amendment.

This was specifically recognized by this Court in the great historic case of *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33, where it said: "Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers." And in *Thomas v. Collins*, 323 U. S. 516, 546, 547, Mr. Justice Jackson, in concurring, wrote:

"The necessity for choosing collective bargaining representatives brings the same nature of problem to

groups of organizing workmen that our representative democratic processes bring to the nation. Their smaller society, too, must choose between rival leaders and competing policies. . . . If free speech anywhere serves a useful purpose, to be jealously guarded, . . . it would be in such a relationship. . . .

Free speech on both sides and for every faction on any side of the labor relation ~~is~~ . . . a constitutional and useful right."

"It cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind, through regulating the press, speech and religion. In this field every person must be his own watchman for the truth." *Thomas v. Collins*, 323 U. S. 516, 545.

"Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 642.

It is for the members of the union, not the members of Congress, to determine who shall and who shall not preside at a union meeting, safeguard the union funds, and organize a strike. Judge Prettyman, in his dissent in *National Maritime Union v. Herzog*, 78 F. Supp. 146, has aptly described the manner in which Section 9(h) affects labor unions:

"It is directed to the union and not to the individual. It provides, in effect, that if the union wishes to become the exclusive bargaining representative of its members, it cannot use the services of persons who belong to the proscribed political party, and the persons who belong to that party cannot become union

officers. This is an abridgement of the rights of the members of the union to select their officers. Since the officers are, realistically and in common practice, the managers of the affairs of the organization and the spokesmen in its behalf, limitations upon their selection are limitations upon the speech and assembly of the members. Certainly the selection of officers is an essential element of an assembly and also of mass speech by a group of individuals." (178)

This attempt at intellectual guardianship of workers and their unions is not rendered less offensive to the Constitution by its mask of indirection. Counsel for the Board, in defending Section 9(h), has taken the position that Section 9(h) does not deny any constitutional right, but merely imposes a condition by which a union officer by his own voluntary act may deprive his union, not of a constitutional right, but of the statutorily created privilege of using the facilities of the National Labor Relations Board, a privilege to which, so it is argued, Congress may validly attach conditions bearing a reasonable relationship to the public policy of the Act, which it is argued, is simply to promote the free flow of commerce by lessening industrial disputes. Judge Major, dissenting in *Inland Steel Company v. N. L. R. B.*, 170 F. (2d) 247, subjected this strained rationalization to what is, we submit, irrefutable criticism:

"It is well to keep in mind . . . what the Board appears to overlook, that is, that employees have certain constitutional rights irrespective of any benefit bestowed by the Wagner Act or its successor. (Citing *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33, and *Thomas v. Collins*, 323 U. S. 516, 539, as quoted above.) . . . And as employees have a constitutional right to organize, to select a bargaining agent of their own choosing and, if members of a Union, to elect the officials of such Union, so I would think that the bargaining agent when so selected had

a right of equal standing to represent for all legitimate purposes those by whom it had been selected. The employees in the instant situation have availed themselves of constitutional rights in selecting the Union as their bargaining agent and in the election of its officials.

"At this point it is pertinent to observe that the Wagner Act was enacted primarily for the benefit of employees and not for Unions. The latter derive their authority from the employees when selected as their bargaining agent, rather than from the law. \* \* \* This was not a Congress-created right but the recognition of a constitutional right, which Congress provided the means to protect. \* \* \*

"In my view, the condition attached to the Board's order in the instant case is a direct and serious impairment upon these constitutional rights of both employees and the Union. The rights of the former to organize, select a bargaining agent of their own choosing and elect officers of the Union have been reduced to a state of meaningless gesture." (258)

Section 9(b) is inevitably working fundamental changes in the functioning of labor organizations, making them no longer freely responsive to the freely expressed decisions of their members. Qualifications for office are now secondary to the all-important affidavit of orthodoxy. Judge Major has also forcefully stated this (at page 259):

"The upshot of the whole situation is that employees when members of a Union are under a continuing compulsion to elect officers who will meet the congressional prescription in order that their Union may remain in the good graces of the Board, and they must do this even though it be contrary to their belief, conscience and better judgment. Experience, ability, honesty and integrity of candidates for official positions in the Union must be cast aside."



The National Lawyers' Guild respectfully urges the Court to afford these violated rights of union members the full protection of the First Amendment by striking down Section 9(h).

### Conclusion.

The preferred place given in our scheme of government to the great, indispensable democratic freedoms secured by the First Amendment gives these liberties a sanctity and a sanction not permitting dubious intrusions. Therefore, whereas statutes are ordinarily presumed to be valid unless violation of the Constitution is proven beyond all reasonable doubt, when a law appears to encroach upon a civil liberty or a civil right—particularly freedom of thought and conscience, religion, speech, press and assembly—the presumption is that the law is invalid. *Thomas v. Collins*, 323 U. S. 516, 529, 530; *United States v. Carolene Products Co.*, 304 U. S. 144, 152; *West Virginia Board of Education v. Barnette*, 319 U. S. 624.

The several considerations set forth above exhibit Section 9(h) of the Labor-Management Relations Act of 1947 as encroaching upon fundamental civil liberties with clarity far more than sufficient to bring into operation this presumption of unconstitutionality.

Section 9(h) violates the Constitution in several other grave particulars—by the vagueness of its terms and by its employment of the illegitimate device of guilt by association, especially. We have, nevertheless, sought to conserve the time of the Court by limiting this statement of the position of the National Lawyers' Guild to the three grounds which it considers most novel, significant and ominous.

The National Lawyers' Guild most strongly urges this Court to declare Section 9(h) null and void as being in violation of the Constitution of the United States.

° Respectfully submitted,

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IN THE

**Supreme Court of the United States**

October Term, ~~1948~~ 1949

~~No. 888~~ 10

**AMERICAN COMMUNICATIONS ASSOCIATION, CIO,  
JOSEPH P. SELLY, Etc., et al., Appellants**

v.

**CHARLES T. DOUDS, Individually and as Regional Director  
of the National Labor Relations Board, Second Region**

**BRIEF FOR THE CONGRESS OF INDUSTRIAL  
ORGANIZATIONS AS AMICUS CURIAE**

**ARTHUR J. GOLDBERG,**  
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IN THE  
**Supreme Court of the United States**

October Term, 1948

No. 336

**AMERICAN COMMUNICATIONS ASSOCIATION, CIO,  
JOSEPH P. SELLY, Etc., et al., Appellants**

v.

**CHARLES T. DOUDS, Individually and as Regional Director  
of the National Labor Relations Board, Second Region**

**BRIEF FOR THE CONGRESS OF INDUSTRIAL  
ORGANIZATIONS AS AMICUS CURIAE**

The Congress of Industrial Organizations submits this brief as *amicus curiae* pursuant to Rule 27 of this Court. The written consent of all parties to the case to the filing of this brief has been filed with the Clerk.

**QUESTIONS PRESENTED**

Section 9(h) of the National Labor Relations Act, as amended by the Taft-Hartley Act, subjects a union to certain penalties and disabilities unless each of its officers has filed an affidavit disclaiming belief in or affiliation with communism. Among the sanctions are: (1) The remedies otherwise available under the Act for the redress of unfair labor practices by employers are withheld; (2) The union shop is forbidden; (3) Certain types of strikes and boycotts, otherwise legal, are prohibited; and (4) Non-complying unions are excluded from participating in Labor Board elections, which are so conducted as to favor a competing complying union.

The question presented is whether Section 9(h) is unconstitutional, for any one of the following reasons:

(1) Because it deprives unions, union officers, and mem-

bers of unions, of freedom of thought, speech, and assembly, in violation of the First Amendment, and of freedom to engage in political activity, in violation of the Ninth and Tenth Amendments, of the Constitution.

(2) Because it is vague and indefinite, and imposes tests of guilt by association, in violation of the First and Fifth Amendments.

(3) Because it constitutes a bill of attainder, within the meaning of Article I, Section 9, Clause 3, of the Constitution.

The two latter bases for challenging the provision's constitutionality are fully covered in the Brief for the Appellants, and, for the sake of brevity, only the first point will be covered in this brief.

### **INTEREST OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS**

The Congress of Industrial Organizations is filing this brief because it considers Section 9(h) to be a grave infringement upon the civil liberties of unions, union officers, and union members. Mr. Philip Murray, the President of the CIO and of the United Steelworkers of America, and the other officers of both of those organizations, have refused to file the required affidavits. They have not refused because they are communists or because they have any sympathy for communism or any desire to retain communists as officers of CIO unions. They have refused because, as a matter of principle, they decline to yield to what they regard as a major invasion of the constitutional rights of labor to freedom of thought, speech and assembly, and of political activity.

Communism has no firmer foe than Mr. Philip Murray. The United Steelworkers of America, of which Mr. Murray is President, has no communist officers. Not only are Mr. Murray and other influential leaders of the CIO effectively combating communist influences in unions, but the CIO has given strong support to the Marshall Plan and to ECA. Thus, the CIO's objection to Section 9(h) flows not from sympathy with communism, but from a devotion to civil rights and from a belief that unless the civil rights of communists are protected, those of others will not be.

Because it has not complied with Section 9(h), the United Steelworkers of America, CIO, and its almost one million members have been subjected to or are threatened with various penalties for non-compliance, which are elaborated in Point I of the Argument. The United Steelworkers are, moreover, only one of several national or international unions, CIO, AFL and Independent, which have not complied with Section 9(h), and are similarly subject to its sanctions.

For these reasons, the Congress of Industrial Organizations has a very great interest in the question at issue in this case.

### **ARGUMENT**

This brief is addressed solely to the proposition that Section 9(h) of the National Labor Relations Act is unconstitutional because it deprives unions, union officers, and members of unions of freedom of thought, speech, and assembly, in violation of the First Amendment, and of freedom of political activity in violation of the Ninth and Tenth Amendments. There are, however, other substantial grounds for challenging the constitutionality of Section 9(h), which, for the sake of brevity, we do not argue, but which are fully covered in the Appellants' Brief.

### **I.**

#### **Section 9(h) Heavily Penalizes Unions Which Have Officers With Proscribed Beliefs, in Order to Force Their Expulsion.**

The Taft-Hartley Act, the "Labor Management Relations Act, 1947" (Public Law 101, 80th Congress, 1st Sess., 61 Stat. 136, 29 U.S.C.A. Sec. 141 *et seq.*) became effective on August 27, 1947. It re-enacted and drastically amended the National Labor Relations Act. Among the provisions added to the old Act by the Taft-Hartley Act is Section 9(h), which reads as follows:

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there



is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports [sic] any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

The gist of this new Test Act is that union officers must fore swear certain proscribed political, or politico-economic, doctrines and associations. The beliefs and activities to be abjured are: (1) Membership in or affiliation with the Communist Party; (2) Belief in the overthrow of the government by force or by any illegal or unconstitutional methods; and (3) Membership in or support of any organization which believes in or teaches such overthrow. The required oath of disavowal will be referred to herein as the non-communist affidavit.

While compliance with Section 9(h) depends upon a union's officers, any one of whom can block compliance by refusing to execute the affidavit, the consequences of non-compliance fall directly only upon the union. These consequences are, in general, that the union loses certain rights under the Labor Relations Act, and is subjected to certain prohibitions—rights which are not taken from complying unions and prohibitions to which they are not made subject.

It is necessary to examine the exact nature of the sanctions for non-compliance, not only because it is essential to an understanding of the purpose and operation of the statute, but because of the peculiar argument made by the Board in support of the statute's validity. In the numerous cases in the lower courts in which the constitutionality of Section 9(h) has been in issue, the Board has always asserted that the only consequence of non-compliance is that benefits otherwise conferred upon unions by the Act are withheld. The Board then goes on to argue that when Congress is dispensing favors, it raises no question under the First Amendment by conferring

them upon some and denying them to others, but only a question under the due process clause of the reasonableness of the classification. This is so, the Board contends, even if the test for selecting or rejecting beneficiaries is their political or economic beliefs. The Board then supports the validity of the statute under the due process test of reasonableness, conceding that it cannot meet the clear and present danger test which is applicable to legislation restricting rights protected by the First Amendment.

Even upon the assumption that Section 9(h) is enforced only by withholding benefits, the Board's argument that the use of a political test for selecting beneficiaries does not impair freedom of thought, speech and political activity is wholly unsupportable under the decisions of this Court. That is fully demonstrated in the Appellants' Brief, pp. 32-57, and will not be gone into in this brief.<sup>1</sup>

What we shall show is that the Board's assertion that Section 9(h) is enforced only by withholding benefits is entirely misleading. We shall demonstrate, on the contrary, that the sanctions evoked by failure to file the affidavits impose upon a non-complying union penalties so heavy as to threaten its existence, leaving it no real alternative to expulsion of the officers whose beliefs offend 9(h). It follows that the statute must be judged as if it explicitly prohibited persons of the proscribed beliefs from serving as union officers.<sup>2</sup>

<sup>1</sup> We wish only to add that a similar argument was made and rejected in *Thomas v. Collins*, 323 U.S. 516. In that case this Court held unconstitutional a Texas statute which required organizers to secure an identification card from a state board before soliciting persons to join unions. The state, like the government here, sought to avoid the clear and present danger test by urging that the statute did not restrict free speech but regulated business practices, so that the test of its constitutionality was only whether it had a reasonable basis. This Court rejected the state's contention, and held that the clear and present danger test applied, stating (p. 530):

\* \* \* It is the character of the right, not of the limitation, which determines what standard governs the choice.

<sup>2</sup> The Board makes no point of the fact that union officers' beliefs are ascertained by requiring them to file affidavits, rather than in some other way. None could be made: the exaction of a test oath, is, if anything, the very method of determining belief which is most offensive to civil rights, both because of its origin and frequent use as an in-

### **A. Section 9(h) Heavily Penalizes Non-Complying Unions**

1. *Withholding of Remedies Against Employers*—Section 9(h) directs the Board to withhold from a non-complying union the remedies otherwise available to it under the Act for the prevention and redress of unfair labor practices by employers.\* As to non-complying unions, employers are once more free to use the repressive practices by which they broke unions and prevented unionization in the days before the Wagner Act was passed.

Literally, Section 9(h) only prohibits the Board from acting upon charges filed by non-complying unions, leaving it free to consider charges by individual members of such unions. However, even the Wagner Act gave the Board complete discretion, not subject to judicial review, as to whether to act on charges.\* By a Taft-Hartley amendment (Section 3(d)), that discretion was transferred from the Board to the General Counsel, whose dismissal of charges is now not reviewable even by the Board.

It is the General Counsel's normal practice to entertain charges filed by individuals alleging violations of Section 8(a)(3), and presumably 8(a)(1) and (4), but not those alleging violations of 8(a)(2) and (5). However, even as to charges of the former types, the General Counsel, sometimes, if the complainant's union is not in compliance, arbitrarily refuses to issue a complaint. In such cases the ground assigned for dismissal is that the members were acting for the union, although it is the individual who is the primary victim

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strument of tyranny and because of the element of self-incrimination. Cf. *Cummings v. Missouri*, 4 Wall. 277, and *Ex Parte Garland*, 4 Wall. 333.

As it passed both Houses, the bill did contemplate that the Board would determine whether union officers entertained the proscribed beliefs. It was changed in conference to avoid the administrative delay which that would have entailed. See 93 Cong. Rec. 6604. (References throughout to the Congressional Record are to the daily preliminary print.)

\*The language of Section 9(h) is that "no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10," unless the required affidavits are on file with the Board.

\**Marine Engineers' Beneficial Ass'n. Local No. 33 v. N.L.R.B.* (C.C.A. 2, not reported below), certiorari denied 320 U.S. 777; *White v. N.L.R.B.*, 5 Labor Cases 62,742 (Ct. App. D.C. 1941) not officially reported. And see *Jacobsen v. N.L.R.B.*, 120 F. 2d 96, 100 (C.C.A. 3).

of an unfair labor practice of this type. (See e.g., *In re Times Square Stores Corp.*, 79 N.L.R.B. No. 50).

Moreover, only the union can complain of an employer's refusal to bargain with it. Non-complying unions which have for years been the certified bargaining representatives in particular plants, are thus now deprived of all legal remedy against the employers' refusal to bargain with them. This effect of Section 9(h) is strikingly illustrated by the cases of *United Steelworkers of America, CIO v. N.L.R.B.*, No. 431, this Term, pending on petition for certiorari to the Seventh Circuit; and *United Steelworkers of America v. N.L.R.B.*, now pending decision in the Court of Appeals for the First Circuit. In each of those cases the union had for some years been the certified bargaining representative in the particular plant involved; the employer refused to bargain about certain subjects; the union filed a charge with the Board; and, after a hearing, the trial examiner issued a report recommending that the employer be ordered to bargain with the union on the issues in question. Each case stood in this posture when the Taft-Hartley Act was passed, and in each case the Board then conditioned its order upon compliance by the union with the new Section 9(h).

Employers are not forbidden to recognize or bargain with non-complying unions; but, if the employer refuses, the union has no legal remedy under the Act. The result is that the employer, and not the government, decides whether the sanction of non-recognition is to be invoked against a non-complying union. For the government to discriminate against unions on account of the political and economic beliefs of their officers is bad enough. For it to delegate such power to employers is worse.

Whether a particular employer will decide to withdraw recognition from a non-complying union will depend on several considerations. One is whether he can effectively alienate the support of the union members and others in the community from the union on the ground that the union leaders hold proscribed beliefs. Attacks by employers upon unions and unionism for "patriotic" reasons are, of course, not a novel phenomenon in the field of labor relations. The recent long-

shoremen's strike on the west coast took place because the employers were induced by 9(h) to believe that they could successfully refuse to deal with the existing leadership of the union. See *Fortune*, January 1949, p. 153. A second factor which will enter into the employer's consideration is whether the economic strength of the union is so great as to make it impracticable for him to withdraw recognition. For while a union has no legal remedy, it still has the right to strike or invoke other economic sanctions not prohibited by the Taft-Hartley Act. (In the west coast strike, the employers underestimated the union's economic strength, and ended by signing a contract with the old union leaders.)

Yet a third factor which may induce an employer to withdraw recognition from a non-complying union is the presence in the field of a competing union which is more acceptable to the employer. As explained below, the Board conducts its representation elections in such a fashion as to virtually insure the victory of a complying union. Thus, an employer can legally use non-compliance with Section 9(h) indirectly to influence its employees to reject the non-complying union and select its competitor. That, of course, is just what an employer is forbidden to do directly by Section 8(a)(2).

**2. Outlawing of Union Shop.**—The consequences of non-compliance with 9(h) go far beyond the loss of legal remedies under the Act. Unions which are not in compliance with Section 9(h) are prohibited from entering into a union shop contract with an employer. That is effected in this way: the Act, by Sections 7, 8(a)(3), and 8(b)(1), prohibits the closed shop and permits the union shop only after the union has won a special type of election provided for in Section 9(e)(1) of the Act. And Section 9(h) provides that no such election shall be conducted at the behest of a non-complying union.

Not only the union shop, but the closed shop, was legal long before the Wagner Act. Indeed, this provision puts non-complying unions under a restraint to which unions were never before subjected by federal legislation. A closed or union shop is the goal of every union. To prohibit the union shop to non-complying unions, while permitting it to complying unions, is to strike the former a deadly blow.



3. *Non-Complying Unions Excluded from Board Elections.*—The exclusion of non-complying unions from participation in Board elections, and the holding of these elections under rules which virtually insure the success of competing complying unions, are discussed in Appellants' Brief, pp. 13-17. Here we wish to add only the most recent example of how the Board goes about permitting employees to designate bargaining "representatives of their own choosing" (Section 7).

In the proceeding referred to (*In re Woodmark Industries, Inc.*, 80 N.L.R.B., No. 171) the Board certified a complying union which received only 15 votes out of a total of 43 cast. Of the remaining votes, 11 were for no union and 17 were write-ins for a non-complying union which had theretofore been the bargaining representative. The Board voided the 17 write-in votes and certified the complying union, which was the only union on the official ballot, on the ground that it won a majority of the 26 valid ballots cast.

The write-in votes were not even given the status of votes against the complying union. If they were, the Board declared, the non-complying union would reap "an indirect benefit . . . [from a Board election] as the result of having demonstrated its strength in such election and having secured the defeat of a complying labor organization properly participating therein."

This "election" strikingly resembles those held in the "People's Democracies" of eastern Europe. Joyfully accepting the mandate of the 80th Congress to stamp out political unorthodoxy in unions, the Board reduces to a mockery the constitutional rights of workers to form and join labor organizations of their own choosing.\*

Theoretically, it is open to a non-complying union, faced with such an election, to persuade the employees to reject its complying competitor by voting for no union, and then, by using its economic strength, to induce the employer to bargain with it. Practically, such a course is most difficult. In

\* A more euphemistic description of what happens in these Labor Board elections is that of the Congressional Committee on Labor-Management Relations, in its Report issued December 31, 1948 (p. 35):

" . . . unions whose officers have complied had marked success in NLRB representation elections whereby they have supplanted the noncomplying union.

an election in which the ballot offers only the choice between the complying union and no union, the employees usually will choose the complying union, rather than vote for no union at all, even though they would choose the non-complying union if they were given that choice. The choice between a complying union and no union is not a free choice, if what the employees want is to be represented by a non-complying union.

This is not a withholding of statutory benefits: it is a direct interference with the constitutional right of self-organization. See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33-34; *Thomas v. Collins* 323 U. S. 516, 539. Such interference is not limited to the holding of rigged elections. It is implemented also, in the statutory provisions to which we now come, by penalizing non-complying unions and protecting complying unions.

4. *Certain Strikes or Boycotts by Non-Complying Unions Prohibited*—In three types of situations the Act makes illegal and creates novel and drastic sanctions against strikes or boycotts by non-complying unions while permitting them by complying unions. These provisions operate not only for the protection of employers but of complying unions which have won "elections" of the sort just described.

Section 8(b)(4)(B) makes it an unfair labor practice for a union to engage in a strike or boycott against one employer for the purpose of requiring another employer to recognize a union, unless that union has been certified as the bargaining representative under the Act. Since a non-complying union cannot be certified, the effect of Section 8(b)(4)(B) is to deny to every non-complying union the aid, by strike or boycott, of other labor organizations, in seeking bargaining rights. Prior to the enactment of Section 9(h), and prior to the Wagner Act as well, labor organizations supported each other in striving for recognition. Now the Act denies such support to non-complying unions, while permitting it to complying certified unions.

Section 8(b)(4)(C) makes it an unfair practice for a union to strike to compel recognition if another union has been certified. This provision, obviously, is for the protection of

complying unions which have won "elections," in which competing non-complying unions have been excluded from the ballot. The non-complying union, having been barred from the election, is also denied the use of its economic weapon—a strike. And the complying union, having had the benefit of a one-ticket election, is given an additional protection which it would not need if it were actually the free choice of the employees. Here, again, non-complying unions are prohibited from engaging in conduct which was legal before Taft-Hartley.

Section 8(b)(4)(D) prohibits a union from striking to secure the assignment of particular work to its members, unless it has been certified as the representative for employees performing such work. Once again, activities which were legal in the absence of statute, and which continue to be legal for certified complying unions, are outlawed when undertaken by organizations which have not complied with Section 9(h).

The summary injunction procedure created by Section 10(1) of the Act (described in Appellants' Brief at p. 16) may be invoked against strikes or boycotts prohibited by Section 8(b)(4)(B) and (C); and such strikes and boycotts, and those prohibited by 8(b)(4)(D) as well, are also declared to be illegal for the purpose of suits for damages by employers.\*

The cumulative effect of all of these provisions upon a non-complying union is obviously very great. As stated by Judge Prettyman, dissenting, in *N.M.U. v. Herzog*, 78 F. Supp. 146, 179 (D.C., D.C., 1948), it may be doubted whether a non-complying union can permanently survive. At the least, unions are placed under exceedingly strong compulsion to comply with Section 9(h), and to expel union officers who cannot or will not sign the required affidavit. That was precisely the purpose of Congress in enacting 9(h).

## ***B. The Purpose of Congress Was to Force Unions to Expel Officers Having the Proscribed Beliefs***

1. *Legislative History*—Section 9(h) was enacted specifically "to prevent Communists from being officers of labor

\*Section 303(a) repeats the prohibitions of Section 8(b)(4); and Section 303(b) provides that anyone injured by any violation of (a) may sue in any federal district court and recover the damages sustained.

unions." (Senator Ball, 93 Cong. Rec. A3233). Congress did not conceal its purpose: numerous assertions during Congressional debate like that just quoted are assembled in Appellants' Brief, pp. 41-44. Further demonstration of the point seems unnecessary, and the following discussion seeks only to clarify the general outline of the legislative history.

Section 9(h) originated as Section 9(f) (6) of the House bill. As reported out by the House Committee, it contained no requirement for filing affidavits, but provided that the Board shall not certify a union any of whose officers is a member of the Communist Party, etc.<sup>7</sup> The House bill also contained a provision, which was Section 8(c) (6), prohibiting unions from expelling members except upon certain specified grounds, one of which, subsection (D), was being a member of the Communist Party, etc.

Referring to these two provisions, the House Committee Report (No. 245, 80th Cong., 1st Sess., pp. 38-39) stated:

*Section 9(f) (6).*—At least 11 great national unions and a large number of local unions seem to have fallen into the hands of Communists, although in every case Communists appear to compose only a very small minority of the membership. In most of these cases the rank and file object to communistic influence in their unions. By the bill of rights set forth in section 8(c), the bill helps them to rid themselves of communistic control. Section 9(f) (6) makes it incumbent upon union leaders who now tolerate Communist infiltration in their organizations, affiliates, and locals, and temporize with it, to clear house or risk loss of rights under the new act.

• • • Communists use their influence in unions not to benefit workers, but to promote dissension and turmoil. They should be weeded out of the labor movement.

<sup>7</sup> Section 9(f) (6) was amended in the House to apply to any officer who "is or ever has been" a member of the Communist Party, etc., the amendment being adopted by a vote of 153 to 10. It was later dropped in conference.

The "ever has been" test that was included in the House Bill is omitted from the conference agreement as unnecessary, since the Supreme Court has held that if an individual has been proved to be a member of the Communist Party at some time in the past, the presumption is that he is still a member in the absence of proof to the contrary. [Report No. 510, 80th Cong., 1st Sess., p. 49.]



It was presumably because of the presence of Section 8(c) (6) (D) in the House bill that it was several times asserted during the House debates (see Appellants' Brief, pp. 41-42) that the bill would "drive Communists out of our labor organizations" (Congressman Hartley, 93 Cong. Rec. 3705), and not merely that the bill would drive out labor officers who were Communists.\* Section 8(c) (6) was, however, dropped in conference, its place being taken by a provision in Section 8(a) (3) that even under a union shop contract an employer shall not discharge an employee who is expelled from a union for any reason other than non-payment of dues. The subsequent discussion concerning what had become Section 9(h) (see Appellants' Brief, pp. 42-44) was, hence, more sharply focused, both in the Senate and in the House, and was explicit that it was "The provision to keep communists out of leadership of unions . . . ." (Representative Engel, 93 Cong. Rec. A2803.)

2. *Joint Committee Report*—Title IV of the Taft-Hartley Act created a Joint Committee on Labor-Management Relations, for the purpose of studying labor-management relations, including the operation of the Act. This Committee has found that Section 9(h) has been quite effective in achieving its purpose of forcing unions to remove communistic officers. Its report dated March 15, 1948, stated (Senate Report No. 986, 80th Cong., 2nd Sess., pp. 10-11):

Officers of a large majority of labor organizations have complied with the filing requirements. In many instances, unions have taken decisive action to compel reluctant officers to comply with the filing requirements. Recent newspaper accounts report action by the International Lady Garment Workers Union (AFL), the United Furniture

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\* An additional statement to the latter effect is that of Representative Bell (93 Cong. Rec. 3704):

Mr. Chairman, this is a correcting amendment to paragraph 6 on page 33 which provides that any person who is a Communist or belongs to certain Communist organizations shall not be an officer in a union. I am in thorough accord with the purpose of that paragraph which is to protect the future of this country against the impending danger of having Communists in control of our great American labor organizations.

This bill was regularly spoken of as barring or excluding Communists from serving as officers of unions. See e.g. statements of Representative Mundt, 93 Cong. Rec. 3706-7; Congressman Crawford, 93 Cong. Rec. 3706.



Workers (CIO), and the United Shoe Workers (CIO), to cleanse their organizations of officers who are not willing, or are not able, to file the necessary affidavits.

A few large labor organizations, such as the United Electrical Workers of America (CIO), the United Steelworkers of America (CIO), and the United Mine Workers of America, independent, have announced it as their policy that they would not comply with the filing requirements of the act. Some evidence of membership dissatisfaction with the policy of boycotting the processes of the National Labor Relations Board has been noted. For example, a New York local of the United Electrical Workers, Local 1237, is reported to have withdrawn and formed an independent mechanical and electrical workers' union in order that it might have the protection afforded by the new act. Also, in St. Louis, a large segment of the Retail, Wholesale and Department Store Employees Union (CIO), seceded from that union to form a new independent union and took quick steps to comply with the act. In Pittsburgh, the State liquor store employees broke away from the United Public Workers (CIO) to form an unaffiliated union. Other unions which have not yet complied are bringing themselves within the protection of the act. Recently the CIO's union of Marine and Shipbuilding Workers, with an estimated membership of more than 100,000, voted to comply with the affidavit and registration requirements.

The committee hopes that within the very near future all labor organizations in the United States will be persuaded of the benefits which the procedures under the Taft-Hartley Act hold out for them and will take the necessary steps to avail themselves of the benefits and peaceful procedures offered by the law.

The Joint Committee's final report, issued December 31, 1948, likewise states (p. 3):

Elimination of Communist partisans and adherents from official posts and positions of responsibility in both national and local unions is one of the most pronounced and significant effects of the Labor Management Relations Act, 1947. There are still unions, in a steadily declining number, however, whose officials have not filed non-Communist affidavits in compliance with the law. A number of unions have fully met this provision with the ouster of officials who have failed to meet this statutory requirement.

Again (p. 35):

In many instances, unions have taken decisive action to compel reluctant officers to comply with the filing requirements. Refusal by incumbent officers to make the affidavit has been an issue in a number of union elections which resulted in such officers being denied reelection.

## II

### **By Penalizing Unions for Having Officers With Proscribed Beliefs, Section 9(h) Impairs Basic Civil Rights Protected by the Constitution**

Freedom of political thought and action is what separates democracy from despotism, or, to use a term currently more popular, totalitarianism. Any system of free government must recognize the right of people to determine for themselves what they believe in—and to act on their beliefs. If political freedom is to be preserved in this country, these rights must be zealously safeguarded. Fear of a foreign police state must not be the excuse for degenerating into one here. It is not enough to hate communism, as did the Congressmen who enacted Section 9(h). We must love democracy as well, understanding that its essence is the right of the people fully to choose among competing political and economic beliefs.

The question before the Court is the constitutionality of a statute which is designed to force unions to remove officers who do not forswear certain proscribed political and economic beliefs, and which subjects unions to various onerous penalties unless they do remove such officers. Such a statute, we submit, infringes the most fundamental civil rights of unions, union members, and union officers; and can be sustained only if the criteria for testing the validity of legislation invading freedoms normally protected by the First Amendment are met.

#### ***A. Section 9(h) Restricts Unions and Members of Unions in Their Exercise of Freedom of Thought, Speech and Assembly, and of Political Activity***

Under the political systems which have developed in the democratic countries, effective action in the political field means group action—action through political parties, labor

unions, and other associations.' The right to form, to solicit others to join, and to act through such organizations is protected by the Bill of Rights. It is the form which the freedom of assembly of earlier times takes in a more populous country and a more complicated society. Such groups often afford the only effective vehicle for the exercise of free speech.

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate

\*The unique contributions of voluntary associations, other than political parties, to the formation and strengthening of democratic processes and institutions in the United States has been the subject of frequent comment. On the significance of groups in American life, see Schlesinger, *The Rise of the City—1878-1898* (1933), pp. 409-410; Bryce, *The American Commonwealth* (1910), p. 294; de Tocqueville, *Democracy in America* (1900), pp. 114-118. On the vital role played by voluntary groups in the founding of the American republic, see Van Tyne, *The Causes of the War of Independence* (1922), pp. 373, 374-376, 427-428 (Committees of Correspondence).

On the contributions of groups and voluntary associations in particular fields, see

#### Race Relations:

Hobbs, *The Antislavery Impulse* (1933); McMaster, *History of the People of the United States* (1895), Vol. II, p. 21; Myrdal, *American Dilemma* (1944), Vol. II, pp. 810-857;

#### Peace Movements:

Curti, *American Peace Crusade* (1929); Schlesinger, *The Rise of the City* (1933), pp. 365-366;

#### Economic Relations:

Hinds, *American Communities and Cooperative Colonies* (1908); Noyes, *History of American Socialisms* (1870); Adams, ed., *History of Cooperation in the United States*, Vol. VI, Johns Hopkins Studies in Historical and Political Science (1888);

#### Women's Rights:

Schlesinger, *New Viewpoints in American History* (1926), pp. 126-160;

#### Public Schools and Adult Education:

Curti, *The Growth of American Thought* (1943), pp. 349-352, 596-597; Post, *Popular Free Thought in America* (1943), p. 87;

#### Land Reform and Colonization:

Zahler, *Eastern Workingmen and National Land Policy* (1941); McMaster, *op. cit.*, Vol. VI, p. 109;

#### Agricultural Associations:

Oberholtzer, *A History of the United States Since the Civil War* (1926), Vol. III, pp. 102-109; Hicks, *The Populist Revolt* (1931);

#### Humanitarian and Related Movements:

Fish, *Rise of the Common Man* (1927), pp. 259-260; Stewart, *The National Civil Service Reform League* (1929); Nevins, *The Emergence of Modern America* (1927), p. 334; McCrea, *The Humane Movement* (1910).

rights, . . . and therefore are united in the First Article's assurance. [*Thomas v. Collins*, 323 U.S. 516, 530].

For workers, political expression is, to an ever increasing extent, through their unions. Just as individual workingmen must act in concert if they are to further their economic interests, so they must express their political views through the spokesmen for their group if they are to exercise their political freedom effectively. As one writer has put it:

*Labor has always been in politics.*

It is difficult to conceive of any functioning labor organization which does not take part in politics. For the leaders of labor, politics was, and is, the other side of the trade-union coin.

Every labor organization is, in principle, dedicated to the protection of the rights of its members and to the improvement of their conditions. If these objectives are to be attained, labor must ask for legislation of many kinds. Whether a union succeeds or fails in getting its demands depends entirely upon whether the legislators are for labor or against labor. In turn, very naturally, labor supports those legislators friendly to labor, and repudiates those who are anti-labor.

It has always been so.

As far back as 1886, Samuel Gompers said, "We regard with pleasure the recent political action of organized workingmen of this country, and by which they have demonstrated that they are determined to exhibit their political power." Joseph Gaer, *The First Round*, (1944), p. 49."

"The best available account of the forces which have stimulated labor's political activities is Taft, *Labor's Changing Political Line*, 43 Journal of Pol. Ec. 634 (1937).

The following texts document the historic role of labor in American political life:

Beard, *The American Labor Movement, A Short History* (1935), pp. 33-46, 54-61, 80-85, 103-112, 165-171; Bimba, *The History of the American Working Class* (1927), pp. 84-89, 204-208, 323-330; Carroll, *Labor and Politics* (1923), pp. 27-54, 80-138; Childs, *Labor and Capital in National Politics* (1930); Commons and Associates, *History of Labor in the United States*, Vols. I and II (1918), Vol. I, pp. 169-335, 369, 434-471, 522, 535, 548-559; Vol. II, pp. 85-109, 124-130, 138-146, 153-155, 168-171, 240-251, 324, 341-342, 351-353, 461-470, 488-493; Daugherty, *Labor Problems in American Industry* (1933), pp. 622-629; Foner, *Labor Movement in the United States* (1947), pp. 104-105, 130-134, 140, 149-166, 210-217, 245-248, 262-263, 334-336, 357-359, 372-373, 423-429, 475; Harris, *American Labor* (1938), pp. 33-55, 65-69; Hoxie, *Trade Unionism in the United States* (1917), pp. 78-102; Lorwin, *The American Federa-*



With the increased participation of government in our economic life, workers are forced to go into politics, through their unions, in order to preserve their economic security and standard of living. If an individual is helpless in dealing with his employer, then how can it be said that he is more able to deal with the powerful employer-dominated political interests which, unless restrained, can decisively fix or alter the terms and conditions under which he must live? In sheer self-protection he must associate with others in order to preserve those political values which enforce and promote his economic interests. He must organize politically in order to defend against political attack the gains achieved through his economic strength. He must organize politically in order to meet the organized political attack of other interests in our national life. And he must organize politically in order to safeguard and promote his right to form and join unions and his right to bargain collectively and to strike.<sup>11</sup>

Leaders of modern labor organizations are necessarily participants in the political life of their local community, of their State, and of the Nation. They express the political views of their organizations. They consult with and are consulted by other organizations and individuals. They lend support to joint projects and they ally themselves with others to induce the passage of legislation and to achieve other political goals. They participate in political planning and election campaigns. They take part in government administration and in the shaping of government policy, as in the case of the tripartite Na-

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*tion of Labor* (1933), pp. 88-93, 123-126, 221-226, 351, 397-425; Millis and Montgomery, *Organized Labor* (1945), pp. 7, 10, 27, 29-31, 34, 42n, 51, 52n, 54-56, 57n, 62, 67, 71, 81, 91, 108-111, 118, 123-129, 141, 143, 149, 178, 181-188, 232-238, 303-305, 311, 313, 317-320, 348-349, 600, 669, 829, 890; Perlman, *A History of Trade Unionism in the United States* (1929), pp. 146-160, 285-294; Perlman and Taft, *History of Labor in the United States, 1896-1932* (1935), pp. 150-166, 525-537; Schlesinger, *The Age of Jackson* (1945), pp. 132-158, 180-185; Walsh, C. I. O., *Industrial Unionism in Action* (1937), pp. 248-271; Ware, *The Labor Movement in the United States, 1860-1895* (1929), pp. 350-370; Ware, *The Industrial Worker, 1840-1860* (1924), pp. 154-162.

One of the most powerful factors which brought labor into political life was the evil of "Government by Injunction." Lorwin, *The American Federation of Labor* (1933), pp. 88, 90.



tional War Labor Board and National Wage Stabilization Board, in which labor leaders represented the Labor point of view. And they exert an influence in political affairs commensurate with the size of the labor organizations which they head.

Members of labor organizations, aware of the important role of their union in political life, are influenced in their choice of union officers by the political views and beliefs of the candidates. For workers, freedom of thought, speech and assembly and of political activity means freedom of work in unions and through leadership of their own choosing. As established by *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33-34—

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents.

Section 9(h) penalizes unions, and through them their members, for selecting as officers persons having the political beliefs which Section 9(h) proscribes. To tell union members that they cannot have as officers persons of a particular political persuasion restricts their freedom of political activity through the very instrumentality—the union—which is peculiarly adapted to serving as a vehicle for worker expression, both in the political and, if they can be separated, economic fields.

A more direct interference with the freedom of union members—freedom of speech, of assembly, and to engage in political activity, is hard to imagine. Let us take, for example, the case of a union, the majority of whose membership is communist. Section 9(h) prohibits these workers, on pain of onerous penalties to their union, from selecting as their officers persons adhering to the same political party as themselves. Union members are entitled to choose officers whose political beliefs are acceptable to them—not to the Congress. That right cannot be taken away without raising the gravest constitutional issues.

**B. Section 9(h) Restricts Union Officers in Their Exercise of Freedom of Thought, Speech and Assembly, and of Political Activity**

The plain purpose and effect of Section 9(h) is to prevent persons of designated political and economic views from serving as union officers. Thus the statute strikes directly at the freedom of belief, speech, and political activity of union officers. And persons who have exercised these constitutionally protected freedoms in a fashion unacceptable to Congress are, in consequence of their unorthodoxy, denied yet another right to the expression and effectuation of their beliefs—the right, if the membership agrees, to be an officer of a labor union. Thus they are excluded from the very positions in which they might give effective expression to their views—and that, of course, is why they are excluded.

In view of this gross infringement of the civil rights of union officers, it is with a feeling of apology that we point out that they also lose their jobs. This consequence of Section 9(h) is, however, particularly relevant to the Board's argument that the only sanction of Section 9(h) is to withhold from unions benefits otherwise made available under the statute. As to unions this argument is factually misleading and legally irrelevant; as to union officers it is preposterous. They are not denied a benefit: their unions are put under pressure to fire them. Cf. *Truax v. Raich*, 239 U. S. 33.

### III

**Civil Rights May Be Limited Only When Their Exercise Creates Clear and Present Danger to a Paramount Public Interest**

In the language used by Mr. Justice Holmes in first enunciating the now famous test, freedom of speech can be restricted only if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils the Congress has a right to prevent." *Schenck v. United States*, 249 U. S. 47, 52. He spoke in 1919, at the outset of the red scare which followed the first World War. As national hysteria thereafter mounted, the Court, notwithstanding strong dissents by Jus-

tice Holmes and Justice Brandeis, seems to have wavered in its adherence to the clear and present danger test. *Schaefer v. United States*, 251 U. S. 466; *Gittlow v. New York*, 268 U. S. 652.

In more recent years, however, the Court has returned to that test, and has stressed with ever increasing firmness the strong showing of necessity which must be made to uphold legislation which restricts freedom of belief or thought or speech. Thus in *Bridges v. California*, 314 U. S. 252, it said (p. 263):

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

And still more recently, in *Thomas v. Collins*, 323 U. S. 516, 530:

Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

Now the country is again in a period of anti-red hysteria. In a mood far from dispassionate, and with scarcely a voice raised on behalf of ancient freedoms, the 80th Congress enacted Section 9(h)—avowedly for the purpose of driving out union leaders whose beliefs are too radical to be acceptable to Congress.

Surely so gross an invasion of fundamental civil rights is to be sustained only upon the clearest showing of necessity. That is not to say that the Congress is powerless to protect the country against real dangers. Even the gravest invasions of civil rights have been sustained, as in the Japanese removal cases, when thought necessary to protect the nation against imminent peril. But the danger must be real and the restriction on freedom necessary.

#### IV

#### Section 9(h) Cannot Be Sustained Under the Clear and Present Danger Test

These are times of international strain acerbated by the coincidence of national and ideological rivalries. If the activities of the Communist Party constitute a clear and present danger

to the continued existence of the American constitutional system, threatening to overturn it by force or violence, or by treasonable adherence to a foreign power in time of war, the Communist Party can constitutionally be outlawed.

Thus far, however, the judgment both of the country and of the Congress has been that so extreme a step is not warranted. Even the reactionary 80th Congress failed, after long consideration, to pass the Mundt-Nixon bill, and that bill would have stopped considerably short of outlawing the Communist Party. And even in the heat of the political campaigning last summer, the candidates of both major parties agreed that no such extreme step as outlawing the Communist Party should be taken.

The statute now under consideration, is, of course, narrower. It does not outlaw the Communist Party but seeks only to exclude members of that party and others entertaining certain described beliefs from serving as officers of labor unions. But that does not eliminate the need for careful and dispassionate scrutiny of the circumstances which were thought to justify the legislation.

Accordingly, we turn to consideration of the factual showing which the Board offers as justifying Section 9(h)—not as an invasion of rights normally protected by the First Amendment—but as a reasonable discrimination in singling out beneficiaries for government favors.<sup>12</sup>

The legislative history of the Taft-Hartley Act shows that in so far as Congress was aiming at any specific supposed evil in enacting 9(h), that evil was political strikes. Union officers who are communists, might, Congress thought, cause political strikes.

In arriving at this conclusion, Congress appears to have relied exclusively upon the testimony of Mr. Louis Budenz,

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<sup>12</sup> As Judge Rifkind, dissenting below in the present case, pointed out, "indeed, on the argument the defendant disavowed the presence of clear and present danger." 79 F. Supp. 565. Judge Major, in his dissent (*U.S.A. v. N.L.R.B.*, 170 F. 2d 247, 257, C.C.A. 7) similarly noted:

The Board in effect concedes that the section cannot be justified by what the Supreme Court has characterized as the "clear and present danger rule."

Much the same concession seems to have been made in *N.M.U. v. Herzog*. See 78 F. Supp. 146, 147, dissenting opinion of Prettyman, J.

a well-known former Communist who testified before the House Committee which was considering the Taft-Hartley Act. He stated that a strike which occurred at the Allis-Chalmers plant, in Milwaukee, early in 1941, was precipitated by communist officers of the local, not to improve the economic position of the union, but on the instructions of the leaders of the American Communist Party, in order to hinder aid to Britain. And Budenz testified similarly with respect to a strike at the North American Aviation Company during the same period.

That was the only testimony specifically dealing with political strikes which was before the Congressional committee which considered the Taft-Hartley Act.<sup>12</sup> Two strikes, assertedly for the purpose of interfering with aid to Britain, and at a time before the United States entered the war. At a time indeed, when opposition to aid to Britain was, if shortsighted, entirely legal.

Such opposition was not confined to communist labor leaders—it was likewise engaged in by Representatives, Senators, and even some industrialists. It will surely be remembered that a large middle western automobile manufacturer refused an order from Britain for airplane engines, because, it was rumored, of his political viewpoint. Yet that, if true, would hardly be thought to render constitutional a statute designed to exclude Republicans or isolationists from operating industrial plants.

In addition to this specific testimony about two strikes which were assertedly called for political reasons, the hearings on the Taft-Hartley Act and the debates, particularly in the

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<sup>12</sup> In outlining the bill to the House, Congressman Hartley's explanation with respect to Section 9(f)(6)—the predecessor of 9(h)—was as follows (93 Cong. Rec. 3533):

It prohibits certification by the Board of labor organizations having Communist or subversive officers. If anyone doubts the need of that in the bill all you have to do is to read the testimony taken by our subcommittee in connection with the Allis-Chalmers strike in Milwaukee and you will understand that section of the bill is most in order.

Representative Kersten in supporting Section 9(f)(6) on the floor of the House, also used the Allis-Chalmers strike as his only specific justification for the provision. He rehashed Budenz' testimony as to the strike at considerable length. 93 Cong. Rec. 3577-8.



House of Representatives, were replete with vague but violent denunciations of communists, subversives, fellow travelers, party-liners, front organizations, etc., etc. These denunciations did not relate only to Section 9(h) or its predecessor, but were sprinkled throughout the entire discussion of the Act. The House debates are also marked by vitriolic hostility to unions. A reading of this legislative history suggests that Congress was really motivated by general hostility to labor unions and to communism, and in enacting Section 9(h) sought to strike at their point of supposed conjunction. See, for example, the statements by Representatives Smith (93 Cong. Rec. 3473-4), Hoffman (*id.* 3538), Crawford (*id.* 3706). Political strikes were not mentioned in the Senate and occupied no very important place in the House discussion. The Board's argument that Section 9(h) was enacted to meet the danger of such strikes is thus largely an improvisation, devised after the enactment of the statute in the subsequent attempt to justify it.

General denunciations of communism by prominent men are easy to find. We do not disagree with them. Indeed, Mr. Philip Murray, the President of the CIO, has not only denounced communism frequently, but has effectively fought and is fighting the influence of communists in labor organizations.

But these opinions of communists and communism are not a basis for holding that the national security, or industrial peace, are gravely threatened by communist union officers. As stated in *Bridges v. California*, 314 U. S. 252, 263:

• • • even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression.

In addition to the Budenz testimony, which was before Congress, the Labor Board in the lower courts relied upon additional material culled from such diverse sources as reports of the House Committee on Un-American Activities and biographies and other writings of labor leaders. From these last the Board has quoted criticisms of the conduct of communist union officers in calling, or deciding not to call, strikes for reasons

other than achievement of immediate trade union objectives. Several of these examples are of communist union leaders who assertedly refused to call strikes during the war, because, although it would have been advantageous to do so from a strictly trade union standpoint, it would have interfered with war production to the detriment of our then ally, Russia.

The Board has also quoted general statements by Congressmen and others to the effect that communist officers of unions have political, as well as economic objectives. That is, of course, equally true of union leaders who are Democrats or Republicans.

These various materials, as the Board has evidently recognized, fall far short of the showing necessary to sustain a grave invasion of freedom of speech, thought, and political activity. The most that they show, or tend to show, is that communist labor leaders have sometimes called strikes—or decided not to call them—in aid of objectives of the Communist Party other than advancement of the immediate economic interests of the union. And that is all that the materials do show.

They do not show, and Congress did not find (1) that political strikes are a clear and present danger to the security of the nation, or (2) that political strikes threaten widespread, or even substantial, industrial unrest. Absent such a showing, there is no basis for sustaining, under the "clear and present danger" rule, the heavy restraints laid by Section 9(h) upon traditionally protected freedoms.

There is, regrettably, no indication that Congress was even aware that in enacting 9(h) it was trenching upon constitutionally protected freedoms. Hence the provision was never considered there upon the basis of whether some grave evil existed which could be cured only at the cost of some impairment of freedom of thought, speech, assembly and political activity. Had Congress considered the issue in those terms, had it found that some substantial and immediate danger could be met only by restraining normally protected freedoms, a very different question would be presented to this Court.

But Congress proceeded in no such fashion. The House purportedly was disturbed about political strikes—though the last one cited to it had occurred in 1941. Political strikes, as

far as we have found, were not even mentioned in the Senate. That body seems to have adopted 9(h)—after only the most perfunctory consideration"—simply because it wanted to weaken the power of adherents of a party which it detested and distrusted. That these people might have constitutional rights was not so much as mentioned.

The Board likewise, in its defense of 9(h), has found no factual justification for impairing normally protected civil rights, but has groped for some sleight of hand argument by which to avoid consideration on the merits.

In this context, the issue before the Court is not a difficult one. It has simply no basis for sustaining 9(h): neither Congress nor the Board have supplied one. If it should hereafter appear that some major national interest is indeed gravely imperiled by the activities—not the beliefs—of communist labor leaders, it will always be open to Congress to enact, after adequate consideration, a measure genuinely designed to cope with the evil. And such a statute would present a question wholly different from that at issue here.

Even if political strikes were a grave threat to national security or industrial peace, a statute like 9(h) could not be sustained. For the proper remedy would be to prohibit political strikes: not gratuitously to flout the guarantees of the First Amendment by barring members of a particular political party from serving as union officers. That union officers who are members of that party might sometimes resort to political strikes would not justify their expulsion from union office. For the supposed evil could be cured by a narrower remedy not involving political discrimination: that is, by forbidding political strikes.

Statutes restrictive of civil rights protected by the Constitution are upheld, if at all, only if they are "narrowly drawn to cover the precise situation giving rise to the danger." *Thornhill v. Alabama*, 310 U. S. 88, 105. But Section 9(h) does not limit itself to the claimed danger—political strikes. The Taft-Hartley Act invalidates strikes for several purposes

<sup>14</sup> The provision was introduced on the floor of the Senate as an amendment, and was passed after only cursory discussion. See 93 Cong. Rec. 5095.

by unions not complying with 9(h), which are legal for complying unions. See *supra* pp. 10-11. But political strikes are not forbidden, even by non-complying unions.

### CONCLUSION

For the reasons stated, it is submitted that Section 9(h) should be held unconstitutional.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, ~~1948~~

1949

No. ~~888~~ 10

AMERICAN COMMUNICATIONS ASSOCIATION,  
*et al.,*

*Appellants,*

*against*

CHARLES T. DOUDS, Individually, etc.,

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR THE AMERICAN CIVIL LIBERTIES  
UNION, AMICUS CURIAE**

AMERICAN CIVIL LIBERTIES UNION,  
*Amicus Curiae.*

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JEROME WALSH,  
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*Of Counsel.*



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948

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No. 336

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AMERICAN COMMUNICATIONS ASSOCIATION, *et. al.*,  
*Appellants,*  
*against*

CHARLES T. DOUDS, Individually, etc.,  
*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

---

**BRIEF FOR THE AMERICAN CIVIL LIBERTIES  
UNION, AMICUS CURIAE**

**Introductory Statement**

This brief *amicus curiae* is filed by the American Civil Liberties Union, a nation-wide organization of individuals interested in protecting the rights of Americans by legal action and in other appropriate ways.

We have filed this brief, pursuant to leave of the Court, because we believe Section 9 (b) of the Taft-Hartley Act is unconstitutional, for the reasons that it is:

I. An unconstitutional infringement of the right of free speech, as protected by the First Amendment to the Constitution;

II. A bill of attainder in violation of Article I, Section 9, Clause 3 of the Constitution.

## POINT I

**Section 9(h) of the statute violates the First Amendment.**

**A. Freedom of speech can be subjected to previous restraint only when failure to impose controls would create a "clear and present danger" to society. Refraining from speech can never create such a danger.**

This Court has consistently held that the imposition of restrictions on freedom of speech is constitutional only if it can be demonstrated that such restrictions are necessitated by a "clear and present danger" to the public welfare.

This doctrine, stemming from Mr. Justice Holmes' decision in *Schenck v. United States*, 249 U. S. 47, and his dissenting opinion in *Abrams v. United States*, 250 U. S. 616, has perhaps been most definitively formulated in *Bridges v. California*, 314 U. S. 252.

As stated in that opinion:

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here.



They do no more than recognize a minimum compulsion of the Bill of Rights. It prohibits any law 'abridging the freedom of speech and of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." (314 U. S. 252, 263.)

The doctrine has consistently been applied so as to protect the right of free speech and the corollary right of freedom of assembly, by persons of admitted Communist belief. See *De Jonge v. Oregon*, 299 U. S. 53; *Herndon v. Lowry*, 301 U. S. 242.

Moreover, this Court has in recent decisions made it clear that the usual presumption as to the constitutionality of federal or state legislation is inapplicable as applied to a statute which interferes with individual civil liberties. Instead, the presumption has been created that statutes interfering with individual civil rights are unconstitutional. As was stated in *Thomas v. Collins*, 323 U. S. 516.

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Prince v. Massachusetts*, 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.

Compare *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153.

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

It is of course clear that the First Amendment protects not only freedom of speech, but also freedom not to speak. The point was clearly made in the majority opinion in *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 634: "To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual's right to speak his mind, left it open to public authorities to compel him to utter what is not in his mind." The *Barnette* case, *supra*, further established that ideas and opinions, as such, are not subject to any governmental control whatsoever.

Indeed, the "clear and present danger" doctrine logically invalidates any imaginable legislative (or administrative) attempt at limitation of the right to refrain from utterance. The reason for this is that the "clear and present danger" rule makes it possible to limit free speech only when that speech has the demonstrable effect of creating a danger to the public welfare. The refusal to speak, since not in any way capable of inciting other

individuals, is obviously not capable of creating a public danger.

If Congress sought to impose restrictions upon the freedom of speech of Communists, such statutes, under the Constitution, could be upheld, if at all, only if they were "narrowly drawn to cover the precise situation giving rise to the danger." *Thornhill v. Alabama*, 310 U. S. 88, 105.

Even a Congressional declaration that the Communist Party, as such, was engaged in activities inimical to the interests of the United States, could not justify a broad-side restraint on the freedom of speech of Communists. For, as stated in *Bridges v. California*, 314 U. S. 252, 263:

"\* \* \* even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression."

But the issues are quite different when the freedom sought to be restrained is not freedom of speech, but freedom to refrain from speech. For, as was stated by this Court in *Cantwell v. Connecticut*, 310 U. S. 296, 303-4, with reference to the ~~guaranty~~ of non-interference with freedom of speech on the part of the states, embodied in the Fourteenth Amendment:

"Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."

Equally, the guaranty of freedom of belief against Federal interference, as embodied in the First Amendment, is absolute. Hence Section 9(h), which seeks to interfere with freedom of belief, is unconstitutional.

**B. Section 9(h) attempts by indirection to impose invalid restraints on freedom of speech.**

Section 9(h) does not directly deny the right of persons who refuse to sign the test affidavits to hold offices in unions, nor does it expressly prevent unions, having officers who decline to sign such affidavits, from bargaining collectively. Such a direct restriction would, of course, be unconstitutional.

Instead, Congress sought to accomplish by indirection what admittedly could not be done directly.

Section 9(h) attempts to prevent the election of Communists, or other persons who for any reason refuse to sign the test affidavits, as union officers, by denying to unions having such persons as officers, benefits freely available to all other unions, i.e., the facilities created by the National Labor Relations Act. Thus the Section attempts to exert economic pressure to attain a forbidden end.

The debates on Section 9(h) in the Senate clearly indicate that the purpose of the statute was to deny Communists the right to hold offices in trade unions. This was explained clearly by Senator McClellan, as follows:

“ . . . for that reason, as the Senator from Ohio (Taft) has said, the House bill contains a provision prohibiting the certification for bargaining purposes of unions whose officers are Communists or engaged in Communist activities.” (93 *Congressional Record* 5082, May 9, 1947.)

In the House of Representatives, Congressman Hartley, the co-sponsor of the bill, gave the following explanation with respect to Section 9(f)(6)—the predecessor of 9(h) (see 93 *Congressional Record*, 3533):

“It prohibits certification by the Board of labor organizations having Communist or subversive offi-

cers. If anyone doubts the need of that in the bill all you have to do is to read the testimony taken by our sub-committee in connection with the Allis-Chalmers strike in Milwaukee and you will understand that section of the bill is most in order."

The indirection of the Congressional plan does not save its constitutionality. It is surely obvious that Congress cannot indirectly vitiate civil rights, which may not constitutionally be subject to direct destruction.

This Court has always held that neither Congress nor the states could circumvent limitations upon their constitutional powers by "the pretense of regulation." As was stated in *Frost v. Railroad Commission*, 271 U. S. 583, 593 (where the exercise of state power was under consideration):

"There is involved in the inquiry not a single power, but two distinct powers. One of these, the power to prohibit the use of the public highways in proper cases, the state possesses; and the other, the power to compel a private carrier to assume against his will the duties and burdens of a common carrier, the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guarantees, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the



carrier is given no choice, expect a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.”

The same doctrine has been applied by this Court in several situations where the states, under the guise of regulation, sought to impose restrictions on freedom of publication. As was said in *Near v. Minnesota*, 283 U. S. 697, 708:

“With respect to these contentions it is enough to say that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect.”

See also *Grosjean v. American Press Publishing Company*, 297 U. S. 233.

In an effort to save the constitutionality of Section 9(h) the Government has argued that the Section constituted merely a qualification of a privilege, i.e., the rights conferred upon unions by the National Labor Relations Act. Congress has the undoubted right to pass or not to pass, to repeal or not to repeal, the Wagner Act, as it sees fit. However, it does not constitutionally have the right to condition the availability of rights created by the Wagner Act as it sees fit. Specifically, it can neither make those privileges available only to persons who adhere to political or other beliefs accepted by a majority, nor deny those rights to individuals who belong to an unpopular minority.

The doctrine that the power completely to withhold a privilege does not subsume the power to create uncon-

stitutional conditions upon its exercise has been most fully developed in the cases dealing with the regulation by the several states of foreign corporations. It has consistently been held that, while the several states were free to regulate foreign corporations or indeed to deny them absolutely the right to conduct business within their borders, they were not free to make the right to conduct business dependent upon unconstitutional conditions. See *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 30; *St. Louis S. W. Railway Company v. Arkansas*, 235 U. S. 350.

Attempts by the Federal Government to circumvent the First (and Fifth) Amendment by imposing unconstitutional conditions on the availability of so-called privileges have in recent years consistently been struck down by this Court.

The issue has perhaps been most clearly posed in the cases dealing with the withdrawal by the Postmaster General of the second-class mail rate (39 U.S.C. Section 226). *U. S. ex rel. Milwaukee Social Democratic Publishing Company v. Burleson*, 225 U. S. 407 (1921) involved the revocation of the second-class mail privilege by the Postmaster General on the ground that the newspaper in question had violated the Espionage Act of 1917 (40 Stat. 217), by publishing material detrimental to the war efforts of the United States. The Court majority held that such action constituted only a constitutionally valid withdrawal of a privilege created by and subject to Congressional control.

In a dissenting opinion in which Mr. Justice Holmes joined, Mr. Justice Brandeis demonstrated the invalidity of the so-called "privilege" doctrine:

"The contention that because the rates are non-compensatory, use of the second class mail is not

a right but a privilege which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right, for it is paid by taxation" (225 U. S. 407, 433).<sup>9</sup>

The minority views of Justices Brandeis and Holmes in the *Burleson* case were adopted by the majority of this Court in *Hannegan v. Esquire*, 327 U. S. 146, where it was stated:

"But grave questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *United States ex rel. Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 421, 423, 430, 432, 437, 438. • • • Under that view the second class rate could be granted on condition that certain economic or political ideas not be disseminated. • • •"

Even in such traditional fields of allegedly plenary Federal authority as the exclusion of aliens and the importation of literature into the United States, the courts in recent years have held that the statutes could not be employed so as to abridge civil rights protected by the First and Fifth Amendments. See *Schneiderman v. United States*, 320 U. S. 118 (1943); *Kessler v. Strecker*, 307 U. S.

<sup>10</sup> The Court by-passed the constitutional question in the *Esquire* case by its interpretation of the statute.

In its earlier decision in *Ex Parte Jackson*, 96 U. S. 727, 733, upholding Federal legislation prohibiting the use of the mails by lotteries, this Court stated:

"Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press."

22 (1939); *Bridges v. Wixon*, 326 U. S. 135; *Parmelee v. United States*, 113 Fed. (2d) 729 (App. D. C.).

Closely apposite to the statute at bar was the statute presented for judicial scrutiny in *Danskin v. San Diego Unified School District*, 23 Cal. (2nd) 536, 546. That statute prohibited the use of public school buildings by any group which had as an object the overthrow of the government. In its decision overthrowing the statute, the California court pertinently observed that:

"When one searches deeper for the reason that motivates the prohibition of such meetings, there is no escaping the conclusion that the Legislature denies access to a forum in a school building to 'subversive elements', not because it believes that their public meetings would create a clear and present danger to the community, but because it believes that the privilege of free assembly in a school building be denied to those whose convictions and affiliates it does not tolerate. . . .

"The State is in no duty to make school buildings available for public meetings . . . . If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings" (citing *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, and *Marsh v. Alabama*, 326 U. S. 501), and "Since the State cannot compel 'subversive elements' directly to renounce their convictions and affiliations it cannot make such a renunciation a condition of free assembly in a school building."

It is too obvious to require extended argument that what Congress can neither do directly by regulatory legislation nor indirectly by withholding of so-called "privileges" cannot be done by economic pressure exerted through withholding benefits made freely available to others.

*United States v. Butler*, 297 U. S. 1, involved an attempt by Congress to restrict crop production, by inducing farmers to reduce their own output in return for payments. The Government argued that the statute created an entirely voluntary scheme and was a constitutional exercise of the Government's planning power. It contended that a farmer was free to accept or reject the Government payments; but that if he wished to obtain them, he was required to comply with the conditions upon which they were granted.

This Court held that the statute at bar in the *Butler* case was unconstitutional. Looking behind the shadow of voluntarism, to the substance of economic coercion, it was stated:

"The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy." (*ibid.* at 70).

"It is an established principle that the attainment of a prohibited end may not be accomplished under the pretense of the exercise of powers which are granted." (at 68).

The parallelism to the instant case is obvious. Section 9(h) does not make it illegal for Communists to be union officers or for unions to have officers who are Communists. It does not purport to punish union officers who are Communists, nor to punish unions for having Communist officers. However, the statute seeks, and was intended to seek, this forbidden objective by economic coercion.



Section 9(h) is an obvious attempt to punish Communist and other individuals, who for any reason whatsoever, decline to sign the affidavits therein required. This Court, concerned with realities rather than the technicalities of form, cannot but hold the statute unconstitutional as a violation of the First Amendment.

## POINT II

**Section 9(h) is unconstitutional as a bill of attainder.**

**A. The constitutional provision involved and its historical background.**

Article I, Section 9, Clause 3 of the Constitution contains the following unequivocal restriction on the powers of Congress:

“No bill of attainder or ex post facto law shall be passed.”

An almost identical prohibition on action by the states is contained in Article I, Section 10, Clause 1 of the Constitution.

The classic interpretation of the term “bill of attainder” as used in the Constitution is contained in the decision of this Court in *Cummings v. Missouri*, 4 Wall. (U. S.) 277:

“A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties” (at page 323).

Although in use since the Thirteenth Century, bills of pains and penalties and even bills of attainder with a death penalty sentence came into common use in Great Britain as a weapon against political dissenters during the reign of Henry VIII and remained in use throughout the Seventeenth and early Eighteenth Centuries. See I Cooley, *Constitutional Limitations* (8th Ed.), 297, 547. Sometimes the attainders were directed at named individuals; included in this category were bills issued by the Cromwellian Parliament against various counsellors of Charles I and those brought by the House of Commons against Tory leaders under Queen Anne. See E. G. FEILDEN, *Constitutional History of England* (4th Ed., 1911), 153; IV Howell, *State Trials* (octavo edition) 598-9, XV *ibid.*, 1002-12, XVI *ibid.*, 644. In some instances these attainders were enacted after the failure of prior attempts at impeachment.

Frequently the basis for the attainder was the frank charge of "subverting the government", or, as in the 1641 case of the Earl of Strafford, on the ground that he had endeavored to "subvert the ancient fundamental laws and government". XVII Car. 1. Certain of the English political bills of attainder were directed not at specifically named individuals, but at all members of an allegedly subversive group. In this category must be included the bill enacted in 1661 by the restored Charles II, against a group excluded from the general pardon accorded to Cromwell's supporters. XIII Car. II. c. 15.

Acts of attainder had also not been uncommon in the American colonies. Perhaps the most famous example is the bill passed by the General Assembly of Virginia in 1676, inflicting punishment on the principal leaders of Bacon's rebellion against Governor Berkeley, but including within the scope of the act, the large group of uniden-

tified persons who had allegedly aided and abetted the plotters. See H HENNING (Va.), STAT. AT LARGE, 373-4; H STORY, *op. cit. supra*, at 212. Bills of Attainder were also much resorted to by the Colonial legislatures during the American Revolution, in an attempt to eliminate Tory opposition. See Thompson, *Anti-Loyalist Legislation During the American Revolution* (1908), 3 ILL. L. REV. 81, 147 *et seq.* It has been said that "some of the best patriots and most eminent statesmen of the period defended them as being wise and necessary." H STORY, *op. cit. supra*, n. 1, at 211.

The available records of the debates in the Constitutional Convention indicate that the prohibition against Bills of Attainder was passed virtually without discussion and with unanimous approval. Similarly, there was little or no discussion of this prohibition in the debates in the various states on ratification of the Constitution. See V ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* (1845), 462-463; H FARREND, *RECORDS OF THE FEDERAL CONVENTION OF 1787* (1934), 376, III *ibid.* 165; HUNT AND SCOTT, *MADISON'S DEBATES* (Int. Ed.) 449, 479.

The unanimous approval of the prohibition on Bills of Attainder by the Founding Fathers and the Ratifying Conventions reflected their full appreciation, predicated upon their knowledge of Colonial and English legal history of the dangers of legislative punishment, inflicted without judicial trial, upon named individuals or easily ascertained members of a minority group. See H STORY, *THE CONSTITUTION*, (4th Ed., 1873) 210; COOLEY, *CONSTITUTIONAL LIMITATIONS*, (2d Ed., 1891) n. 48 at p. 295.

To the Founding Fathers their experience during the period of the American Revolution was the conclusive demonstration of the necessity of imposing an absolute pro-

hibition on bills of attainder. Their view point is exemplified by the statement made by John Jay, the first Chief Justice of the United States and one of the authors of *The Federalist*, on hearing of the enactment of a New York bill of pains and penalties:

"If truly printed, New York is disgraced by injustice too palpable to admit even of palliation." 1 *Jay, Correspondence and Public Papers* (1890) 315.

**B. Expansion of the definition and application of the term "bill of attainder" by the courts of the United States.**

The first explicit discussion of the term "Bills of Attainder" in the federal courts came in the period immediately after the Civil War. During the reconstruction era, both Congress and many of the state legislatures enacted statutes requiring, as a condition precedent to the exercise of certain political or civil privileges, the taking of an oath to the effect that an applicant had not participated in the "recent rebellion". In some of these statutes, participation was defined so as to include, not only actual service in the Confederate armies, but also "sympathizing with" or "aiding" those forces.

Before this Court passed upon the constitutionality of this type of legislation, three cases had arisen in the lower Federal courts. They tested the validity of the statute providing that no attorney could practice in the Federal courts, without taking a test oath. In all three cases, the act of Congress imposing the test oath [12 Stat. 502 (1862), repealed, 23 Stat. 22 (1884)] was held unconstitutional, for the reason, among others, that it was a Bill of Attainder. *In re Shorter*, 22 Fed. Cas., 16, No. 12811 (D.C. Ala.); *in re Barber*, 2 Fed. Cas. 1043, No. 1118

(D.C. E.D. Tenn.): *Ex Parte Law*, 15 Fed. Cas. 3, No. 8126 (D.C. S.D. Ga.).

Finally, in 1877 this Court in two cases passed upon the constitutionality of the previously cited federal attorneys' test oath statute and of the test oath clause of the Missouri Constitution. *Ex Parte Garland*, 4 Wall. (U. S.) 333 and *Cummings v. Missouri*, 4 Wall. (U. S.) 277, respectively.

*Cummings v. Missouri* was an appeal from the conviction of a preacher who had failed to take the test oath required by the Missouri constitution, as a prerequisite to functioning in the state as attorney, teacher, clergyman, corporate official, or in various other capacities. The oath required individuals to swear *inter alia* that they had never engaged in any past conduct hostile to the United States, or expressed any disloyal sentiments, or aided and abetted enemies of the United States.

The state of Missouri argued that this requirement did not constitute a bill of attainder since it did not inflict any punishment. In support of this contention it was urged that "to punish one is to deprive him of life, liberty, or property, and to take from him anything less than this is no punishment at all \* \* \*" (4 Wall. 277, 320). This contention was effectively refuted by this Court, in an opinion pointing out persuasively that any deprivation of rights freely available to others constituted punishment. The Court's opinion read in part:

"The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does ~~not~~ include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the



source of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.* Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often, has been, imposed as punishment. (Italics supplied.)

• • • • •

“The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.” (*Id.*, at pp. 3207).

In the *Garland* case, *supra*, the Court was required to pass on the constitutionality of the previously cited statute excluding from practice in the federal courts attorneys who had not taken an oath as to their past loyalty to the United States. The Court held that this statute was also unconstitutional as a Bill of Attainder, pointing out that deprivation of the liberty of practicing before the federal courts could “be regarded in no other light than as punishment • • •” (4 Wall. 333, 377).

The same type of issue was presented to the Court in *Pierce v. Carskadon*, 16 Wall. (U. S.) 234. The state of West Virginia had enacted a statute providing that access

could not be had to its courts by any person who had failed to take an oath that he had not participated in or given support to the Confederates. This statute was held to be unconstitutional *per se*, as a Bill of Attainder. See also *Drehman v. Stifle*, 8 Wall. 595, 601.

The clear meaning of the line of cases cited above is to establish that any statute which deprives a class of persons of rights ordinarily available to other individuals in the community, as a consequence of a failure to take an oath of past or present political allegiance, is a bill of attainder. The reason for this is that such deprivation of ordinarily available civil rights in effect constitutes punishment, without judicial trial.

It was urged by the state of Missouri in the *Cummings* case, *supra*, that the test oath provision then at bar did not purport to assert the guilt of any individuals nor to impose any direct punishment upon them. The Court pointed out that it was not the form of the statute, but its effect that was controlling, stating:

"The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding" (4 Wall. 277, 325).<sup>1</sup>

1. Of course, statutes which attempt to prescribe qualifications for particular professions or positions may be applied retroactively without violation of the Constitution, providing that there is no intention to punish, and further providing that the qualifications bear a reasonable relation to the profession or position regulated. Compare *Harker v. New York*, 170 U. S. 189 and *Collins v. Texas*, 223 U. S. 288 with *In the Matter of Dersey*, 7 Porter Rep. 300 (Ala. 1838) and *Gaines v. Buford*, 1 Dana 481, 510 (Ky., 1833).

The latest landmark in the elaboration of a realistic definition of "punishment" for purposes of the prohibition of Bills of Attainder is the decision of this Court in *Lovett et al. v. United States*, 328 U. S. 303. Section 304 of the Emergency Appropriations Act of 1943 (57 STAT. 431, 450) provided that none of the funds therein appropriated could be used to pay salaries to three named individuals. As this Court stated, the purpose of Section 304 was:

"\* \* \* to 'purge' the then existing and all future lists of Government employees of those whom Congress deemed guilty of 'subversive activities' and therefore 'unfit' to hold a federal job.'" 328 U. S. 303, 314.

It was argued that Section 304 was not a Bill of Attainder since it was merely a means of effectuating Congress's power to determine the conditions of employment in the federal government and that denial of such employment did not constitute a "punishment".

This Court held that Section 304 was unconstitutional. It held that the determination of "unfitness" to hold federal office because of alleged political subversion by legislative fiat constituted punishment. It further stated that:

"\* \* \* legislative acts, no matter what their form, when applied \* \* \* to able members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." (328 U. S. 303, 315.)

**C. Section 9(h) is a bill of attainder as that term has been defined by the courts of the United States.**

As was demonstrated in Point I of this brief, Section 9(h) has the following effects:

1. It denies the benefits of the National Labor Relations Act to all unions whose officers decline, whether because they are Communists or not, to sign the test affidavits, even though those benefits are otherwise made freely available to all other unions.

2. It thereby makes it difficult for persons who refuse to sign the test affidavits, whether because of their own Communistic faith or for other reasons, to secure or retain positions as officers of trade unions. The reason for this is that unions who have such persons for officers, suffer an economic detriment in being denied the benefits of the National Labor Relations Act.

In other words, Section 9(h) denies to the trade unions specified in Paragraph 1 above the benefits of legislation made available to all other unions on an equal basis, and it makes it more difficult for the individuals specified in Paragraph 2 above to secure or retain officerships in unions.

It is clear that, judged by the judicial standards set forth in Subsection B of this point, Section 9(h) inflicts punishment upon certain types of unions and certain types of individuals, by depriving them of opportunities or making it more difficult for them to attain rights made available to others. That such deprivation was the intention of Congress has been demonstrated in Point I of this brief.

It follows that Section 9(h) constitutes an intentional infliction of punishment upon easily ascertainable individuals and groups, by legislative fiat and without judicial

trial. That the punishment is not denominated as such is of course irrelevant. For the reasons pointed out in Point I B of this brief, it is equally irrelevant that the punishment takes the form of the withholding of "rights" or "privileges" accorded by Congressional legislation.

As was stated long ago in *Ex parte Law, supra*:

"When it (federal legislation) is so plainly observable that by its own inherent force it effects the destruction of the rights of a large order of persons and is substantially and in effect a bill of pains and penalties, I know of no other term (than bill of attainder) adequate to express it." (15 Fed. Cas. 3, 10.)

The inevitable conclusion is that Section 9(h) is unconstitutional as a deliberate bill of attainder.

Article I, Section 9, of the Constitution was written into the Constitution against the backdrop of the frequent use of legislative punishments without judicial trial during the English political struggles and in the colonies themselves. The language of the prohibition against bills of attainder was deliberately made clear and unequivocal. For the Founding Fathers knew, to quote Cooley,<sup>1</sup> that:

"... what might take place at the will of a king, under a monarchy, might also happen at the demand of an excited and passionate majority at some time in the history of a Republic."

It is respectfully submitted that this Court, always the protector of the civil rights of the American people, should

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1. Cooley, *Constitutional Limitations*, (2nd ed. 1891) 295.



hold that Section 9(h) is unconstitutional, as an unmistakable bill of attainder.

### CONCLUSION

The statute being unconstitutional, the judgments of the court below should be reversed and the entry of an injunction directed.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,  
*Amicus Curiae.*

ASHER BOB LANS,  
OSMOND FRAENKEL,  
of the New York Bar,  
JEROME WALSH,  
of the Missouri Bar,  
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

No. 10.

AMERICAN COMMUNICATIONS ASSOCIATION, C.I.O., JOSEPH P.  
SEELY, ETC., ET AL, *Appellants,*

v.

CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL DIRECTOR  
OF THE NATIONAL LABOR RELATIONS BOARD, Second Region.

On Appeal from the District Court of the United States for  
the Southern District of New York.

**MOTION OF THE NATIONAL LAWYERS GUILD FOR  
LEAVE TO FILE BRIEF AS AMICUS CURIAE IN  
SUPPORT OF THE PETITION FOR REHEARING.**

ROBERT J. SILBERSTEIN,  
*Executive Secretary,*  
National Lawyers Guild

IN THE  
**Supreme Court of the United States**

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SUPPORT OF THE PETITION FOR REHEARING.**

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The National Lawyers Guild respectfully prays leave to  
file a brief as amicus curiae in the above captioned case in  
support of the petition for rehearing heretofore filed herein  
by the appellants. Counsel for the appellants has advised

that they will send directly to the clerk the written consent of counsel for appellant. The Solicitor General of the United States has written applicant that he would not give his consent to the filing of any briefs as *amicus curiae* as he deemed that amended paragraph 9 of Rule 27 of the Rules of this Court showed that this court itself desired to pass on the propriety of filing such briefs.

The National Lawyers Guild is an organization of members of the American bar, devoted particularly to the protection of the fundamental civil rights guaranteed by the Constitution of the United States. It believes that this Court's decision, insofar as it held that the requirement of Section 9 (h) that as a prerequisite to access to Board machinery officers of unions take oaths that they are not members of the Communist Party, was not a bill of attainder overlooked well established principles heretofore stated and applied by this and other Courts. Moreover, it believes that this point has not been adequately presented by counsel for the parties.

In so holding, this Court apparently assumed that a bill of attainder must be punishment for past actions whereas in *Cummings v. Missouri*, 4 Wall. 277 (1866) this Court, at pages 323-324, collects cases, and quotes with approval cases, holding that a bill of attainder covers punishment for action or failure to act in the future as well as in the past.

The fact that article 1, section 9 prohibits Congress from enacting either bills of attainder or ex post facto laws has been held not to mean that only ex post facto laws are bills of attainder, as this Court now seems to hold.

Nor are bills of attainder limited to punishment for belief rather than conduct. It has been the traditional characteristic of bills of attainder that past or future members of a proscribed group were deprived of the right to assume semi-official positions, such as executors, trustees or administrators, because it was believed their beliefs would lead to conduct inimical to the state. Cf. the *Cummings* case at p. 321.

The vice of the bill of attainder is that the finding that named individuals or a named group of individuals hold views likely to result in harm to the state, is made by the legislature rather than by the judiciary. Cf. *Calder v. Bull*, 3 Dall. (U.S.) 386; *United States v. Lovett*, 382, U.S. 303, 315. If Congress should prescribe that all persons belonging to any group advocating political strikes shall take oaths before holding office in a union, that would not be a bill of attainder. The courts would then have to determine whether members of the Communist Party belonged to a group advocating political strikes. The members of the group would have the usual safeguards of a judicial trial and they would know for what they were being tried. Here neither the members of the Communist Party or the Party itself have been given such a judicial trial. But they have been condemned legislatively, whether for this reason or some other, without any semblance of a trial.

It is to be noted that Congress made no finding that the Communist Party or its members were likely to promote political strikes. This word was not mentioned in the statute nor in the reports accompanying the bills nor on the floor of Congress during the debates. While it would still be a bill of attainder had such finding been made, the fact that such finding was not made, reemphasizes the unfairness of bills of attainder.

A reading of the statute itself and its legislative history indicates Congress named the Communist Party because it believed it to be an organization advocating the overthrow of the government by force and violence but did not trust the courts so to find. See Senator Ball's statement during the debates on the Taft-Hartley Act, that Communists "are out to wreck the American system, although again I say it may be impossible to prove it against them" 93 Cong. Rec. (Daily Copy) 5085, May 9, 1947, reprinted Legislative History of the Labor Management Relations Act (Gov't. Print. Off., 1947), p. 1416.



The Supreme Court of California in an opinion by Mr. Chief Justice Gibson held unconstitutional a statute barring the Communist Party from the ballot because the finding was made by the legislature rather than the judiciary. *Communist Party v. Peek*, 20 Calif. 2d 536, 127 P. 2d 889, 896. There it was assumed the legislature found the Communist Party to advocate the overthrow of the government by force. But the ruling would undoubtedly have been the same had it been assumed the legislature found the Communist Party to advocate political strikes.

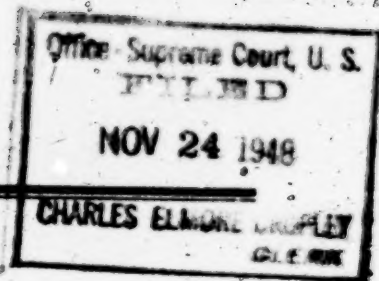
The National Lawyers Guild is prepared to and will, if this motion for leave to file is granted, present to the Court by whatever date it fixes, a brief fully covering the foregoing point.

We believe that this point is one of great importance to the maintenance of ~~our~~ traditional constitutional rights.

For the foregoing reasons it is respectfully submitted that this Court should grant the National Lawyers Guild leave to file a brief as *amicus curiae* in support of the petition for rehearing.

ROBERT J. SILBERSTEIN,  
*Executive Secretary,*  
 National Lawyers Guild  
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 Washington 6, D. C.

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IN THE  
**Supreme Court of the United States**

October Term, 1948

149

No. —

13

**UNITED STEELWORKERS OF AMERICA, et al.,**  
*Petitioners*

v.

**NATIONAL LABOR RELATIONS BOARD**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

**ARTHUR J. GOLDBERG**

**FRANK DONNER**

**THOMAS E. HARRIS**

*Counsel for Petitioners*

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IN THE

**Supreme Court of the United States**

October Term, 1948

No. —

**UNITED STEELWORKERS OF AMERICA, et al.,**  
*Petitioners*

v.

**NATIONAL LABOR RELATIONS BOARD**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

United Steelworkers of America, CIO, *et al.*, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered on September 23, 1948, insofar as it, in enforcing an order of the National Labor Relations Board, sustained a condition, which the Board had attached, that the order become effective only upon compliance by the Union with Section 9 (h) of the National Labor Relations Act.<sup>1</sup>

<sup>1</sup> The decree below was entered in two separate proceedings for review of the Board's order, which were consolidated in the court below (Company App. 401). One of these proceedings (No. 9612 below) was brought by Inland Steel Company to review the order of the Board directing it to bargain collectively with respect to its pension and retirement policies. The other proceeding (No. 9634 below) was brought by United Steelworkers of America, CIO, by its President, Philip Murray, Local Unions No. 1010 and 64, United Steelworkers of America, CIO, and members of United Steelworkers of America, CIO (herein collectively called the Union), to review the provision which the Board attached to its order, conditioning its effectiveness upon compliance by the Union, within thirty days of the date of the order, with the requirements of Section 9 (h) of the Act.

The record in this Court consists of three volumes, these being the appendices which were filed in the court of appeals by, respectively, Inland Steel Company, the Union, and the Board. In this petition the appendix filed by the Union will be referred to as Union App.; the appendix filed by Inland Steel Company will be designated as Company App.; and the appendix filed by the Board will be designated as Board App. The proceedings in the court of appeals have been printed and bound in with the appendix filed by the Company.



## OPINIONS BELOW

The opinion of the Court of Appeals (Company App. 406) has not yet been reported. The findings of fact, conclusions of law, and order of the Board are set out at Union App. 1 and at Company App. 56.

## JURISDICTION

The decree of the Court of Appeals was entered on October 28, 1948 (Company App. 442). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254, and under Sections 10 (e) and (f) of the National Labor Relations Act.

## QUESTIONS PRESENTED

Whether Section 9 (h) of the National Labor Relations Act, which withholds from a union the remedies otherwise available under the Act for infringement of its rights, and makes illegal a union shop contract, unless each officer of the union has filed a non-communist affidavit, is unconstitutional, for any one of the following reasons:

(1) Because it deprives unions, union officers, and members of unions, of freedom of thought, speech, and assembly, in violation of the First Amendment of the United States Constitution.\*

(2) Because it is not narrowly drawn to meet the evil purportedly aimed at, while invading as little as possible the guarantees of the First Amendment, but invades basic rights whose impairment is unnecessary to the provision's claimed purpose, in violation of the First and Fifth Amendments.

(3) Because it is vague and indefinite, and imposes tests of guilt by association, all in violation of the First and Fifth Amendments.

(4) Because it constitutes a bill of attainder, within the meaning of Article I, Section 9, Clause 3 of the Constitution.

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\* The case also presents the related question whether Section 9 (h) interferes with the freedom of unions, officers and members to engage in political activity, in violation of the Ninth and Tenth Amendments. See *United Public Workers v. Mitchell*, 330 U. S. 75, 94-95. For brevity, this issue is not separately discussed in this petition, but it will be argued if the the petition is granted.

### STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Statement.

### STATEMENT

Upon the basis of an amended charge filed on August 16, 1946, the National Labor Relations Board issued a complaint, dated August 19, 1946, against Inland Steel Company, alleging that the Company had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act.

On January 8, 1947, the Trial Examiner issued his Intermediate Report finding that the Company had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, including bargaining collectively, upon request, with the Union as the exclusive representative of the employees in the appropriate bargaining unit.

The Taft-Hartley Act, the "Labor Management Relations Act, 1947" (Public Law 101, 80th Congress, 1st Sess., 61 Stat. 136, 29 U.S.C.A. Sec. 141 *et seq.*) became effective on August 27, 1947. It re-enacted and amended the National Labor Relations Act. Among the provisions thus added to the old Act by the Taft-Hartley Act are Sections 9 (f), (g) and (h). Section 9 (h) provides as follows:

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government

by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.\*

Section 9 (f) and (g), which are not directly involved in this case, impose upon labor organizations certain obligations, subject to the same sanctions as are imposed by Section 9 (h), to file information with the Secretary of Labor relating to the finances of labor organizations, their internal affairs and structure.

On April 12, 1948, the Board sent to the parties by mail its decision and order (Union App. 1; Company App. 56). The Board's order is prefaced by the following statement:

"The Union has not complied with the provisions of Section 9 (f), (g) and (h) of the amended Act. Our remedial order therefore shall be in part conditioned upon its complying with that section of the amended Act, within 30 days from the date of the order herein."

The order, in brief summary, requires the Company to bargain collectively with the Union with respect to its pension and retirement policies if and when the Union shall have complied, within 30 days from the date of the order, with Section 9 (f), (g) and (h). The Company is likewise ordered, subject to the same condition, to refrain from making any unilateral changes affecting the employees represented by the

\* Section 9 (c), referred to in Section 9 (h), is the section in the Act providing for the holding of elections by the Board upon petition by labor organizations, individuals, employees, groups of employees and employers.

Section 9 (e), referred to in Section 9 (h), provides for the holding of an election for the purpose of determining whether a majority of the employees authorize the bargaining agent to negotiate an agreement with the employer making union membership a condition of employment. In the absence of such an authorization, the negotiation of such an agreement is made illegal by Section 8 (b) (1) of the Act; cf. Section 8 (a) (3).

Section 10 (b), referred to in Section 9 (h), is the provision of the Act authorizing the Board to issue complaints that unfair labor practices have been committed.

\* In thus conditioning its order the Board cited *Matter of Marshall & Bruce Co.*, 75 N.L.R.B. 90, where the Board held that, while the failure of a union to comply with Section 9 (f), (g) and (h) of the Act in a case based upon a complaint issued before the passage of the Act does not impair the power of the Board to issue remedial orders in view of the prospective language of the amendments to the Act, an order requiring an employer to bargain collectively with a labor organization looks toward a future relationship and is tantamount to

Union in its pension and retirement policies, without prior consultation with the Union. The Company is also required by the Board's order to post certain notices for a period of 30 days following the receipt of said notices and, in event of compliance by the Union, for 30 days thereafter.

On May 14, 1948, the Union filed with the Board a document (Union App. 56) entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board," in which the Union recited that it had complied with Section 9 (f), (g) of the Act, as amended, within the time limitations prescribed in the Board's Decision and Order of April 12, 1948, and its Rules and Regulations. The Union further recited in its Return that it had not complied with the requirements of Section 9 (h) of the Act, as amended, for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional and void and that said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States. The Union therefore requested the Board to make its decision and order of April 12, 1948, unconditional in form and effect on the ground that the Union had complied with all of those provisions of Section 9 of the National Labor Relations Act, as amended, which are not illegal or unconstitutional.

Thereafter on May 17, 1948, the Board issued an order (Union App. 62) denying the Union's request that the Board's

a certification. The Board held therefore that it would not effectuate the policies of the Act to place the union in the position of a newly certified bargaining representative unless and until it qualifies for certification. Of significance here is the Board's statement that:

"We are convinced that Sections 9 (f), (g) and (h) not only provide procedural limitations upon the Board's power to act with respect to cases arising after the effective date of the amendment, but also embody a public policy denying utilization of the Board's processes directly to aid the bargaining position of a labor organization which has failed to comply with the foregoing Sections. We cannot believe that Congress intended the full force of Government to be brought to bear upon an employer to require him to bargain in the future with a Union which we now lack the authority to certify. Therefore, inasmuch as this Union has not complied with Section 9 (f), (g) and (h) and is not presently qualified for certification as bargaining representative, our remedial order in this proceeding shall in part be conditioned upon compliance by the Union with that Section of the amended Act, within 30 days from the date of the order herein."



decision and order of April 12, 1948, be rendered unconditional in form and effect. On June 10, 1948, the Union filed in the court below a petition to review the Board's orders of April 12, 1948 and May 17, 1948, insofar as their effectiveness was conditioned upon prior compliance by the Union with Section 9 (h) (Company App. 389). The Company likewise petitioned to review and set aside the Board's order insofar as it imposed obligations upon the Company (Company App. 1). Thereafter the court below ordered the cases consolidated (Company App. 401).

On September 23, 1948 the court below rendered a decision upholding the order of the Board in all respects (Company App. 406). The court was unanimous in sustaining the order insofar as it directed the Company to bargain collectively with the Union with respect to its pension and retirement policies, to post notices, etc. As respects the provision of the Board's order conditioning its effectiveness upon compliance by the Union with Section 9 (h) of the Act, Judges Kerner and Minton held that the statutory provision is constitutional, while Judge Major (who spoke for the court on the balance of the case), was of the view that Section 9 (h) is unconstitutional. The reasoning of both the majority and the dissent is more fully developed under Reasons for Granting the Writ.

### **REASONS FOR GRANTING THE WRIT**

The issue involved in this case is the constitutionality of Section 9 (h)—the so-called non-communist affidavit provision—of the Act. The constitutional questions presented are of great importance, not only to labor unions and their members, and to employers, but to the country as a whole, and should be passed upon by this Court. That the constitutional issues are substantial, as well as important, will fully appear from the discussion below.

The validity of the non-communist affidavit provision is already before the Court in *American Communications Association v. Douds*, No. 336 this Term, probable jurisdiction noted November 8, 1948. That is a suit by a union, the officers of which have not filed the non-communist affidavits required by the Act, to enjoin its exclusion from the ballot in an election



under the Act to select a bargaining representative. The present case presents the constitutional issues in a different context: here the sanction for non-compliance with the affidavit provision is that the Board and the court below have withheld the remedies against an unfair labor practice which they would otherwise afford. To have the present case before the Court, in addition to the *American Communications Association* case, would therefore facilitate fuller understanding of the impact upon unions of the non-communist affidavit requirement, and of the relation of that impact to the constitutional issues. Also, it may be advantageous to have before the Court a case which comes up in the regular manner, upon a record made before the Labor Board and upon petitions to enforce or set aside a Board order. It is therefore requested that, if the Court grants this petition, it put the case down for argument at the same time as the *American Communications Association* case.

1. The contention that the statute deprives unions, union officers and union members, of freedom of thought, speech, and assembly, in violation of the First Amendment, presents a substantial and important issue which should be reviewed by this Court.

The statutory provision in question, Section 9 (h) of the Act, withholds from labor unions the remedies otherwise available to them under the Act for the prevention or redress of unfair labor practices by employers,

"unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

Not only does Section 9 (h) withhold unfair labor practices remedies from a union any of whose officers fails to file the affidavit, but it deprives such a union of the opportunity to become a collective bargaining representative through the processes of the Act, and it makes illegal a union shop contract

between an employer and a union any of whose officers has failed to file the required affidavit.\*

If the Act directly provided that a labor union could not select as an officer a member of the Communist Party, or a person who was affiliated with that party, or who believed in, or was a member of or supported an organization which believed in, the overthrow of the United States Government by force or by any illegal or unconstitutional methods, such a provision would, under the decisions of this Court, be unconstitutional as a deprivation of freedom of thought, speech, and assembly, in violation of the First Amendment. The Constitution bars curbs on opinion or belief. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624; *United States v. Ballard*, 322 U. S. 78, 86; and see *Minersville School District v. Gobitis*, 310 U. S. 586, 606 (dissenting opinion of Stone, J.); *Jones v. City of Opelika*, 316 U. S. 584, 608, 618 (dissenting opinions of Stone and Murphy, J. J., which were adopted as the Opinion of the Court in 319 U. S. 103). Yet that is exactly what this statute seeks to do. And, in contrast to non-discriminatory statutes of general application which incidentally collide with opinion or belief, this statute expressly singles out for attack the opinions and beliefs of particular groups.

In addition, advocacy or expression may be curbed only if it presents a clear and present danger to a substantial interest which the State or Nation has a right to safeguard. *Bridges v. California* 314 U. S. 252, 263; *Thornhill v. Alabama*, 310 U. S. 88, 104. No showing of clear and present danger has been made or attempted in the present case. "The Board in substance concedes that the section cannot be justified by what the Supreme Court has characterized as the 'clear and present danger rule.'" (Major, J., dissenting, Company App. 422). Nor did the majority below seek to uphold the statutory provision on this basis.

What the Board argues, and what the majority below held, is that the remedies afforded to unions by the Act are accorded by Congress and not by the Constitution; that Congress can

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\* Section 9 (h) imposes certain important additional disabilities and handicaps upon unions whose officers fail to conform to its requirements. These are not enumerated or discussed here, in the interest of brevity.

make such merely statutory rights available, or can withhold them, on any basis it sees fit, without raising a question under the First Amendment; and that therefore the only constitutional test which Section 9 (h) must meet is that the condition it imposes be reasonably related to the effectuation of a policy which Congress is free to adopt.

But while Congress can unquestionably repeal the National Labor Relations Act, that surely does not answer the question whether it can make rights under the Act conditional upon the acceptance of restrictions which the constitution forbids. This Court has held many times and in a variety of circumstances that the Government cannot exact the surrender of constitutional rights even as the price for the enjoyment of privileges which it is free to withhold completely. Thus this Court has repeatedly stricken down infringements of civil rights which were sought to be imposed in connection with the use of facilities whose use could have been entirely and unconditionally withheld. Such cases have involved denial of the use of the mails (*Hannegan v. Esquire*, 327 U. S. 146), the public parks (*Saia v. People of New York*, 334 U. S. 558), the public schools (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624; *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203), and public thoroughfares and highways (*Hague v. C.I.O.*, 307 U. S. 496; *Marsh v. Alabama*, 326 U. S. 501). Not only these but even cases involving only property rights (see, for example, *Frost v. Railroad Commission*, 271 U. S. 583, 593) make it clear beyond question that it is no defense to a denial of constitutional guarantees that the denial has been accomplished by the withdrawal of a facility.

*United Public Workers v. Mitchell*, 330 U. S. 75, relied on by the majority below, is readily distinguishable, on each of two grounds. In the first place, government employees, according to the four majority justices, occupy a special relation with respect to the government, which permits the latter to regulate their political activities within reasonable limits. It can hardly be thought that union officials owe, or can have imposed upon them, any similar duty to be politically neutral. In the second place, the Hatch Act, involved in the *Mitchell*

case, regulated only political activities, while Section 9 (h) deals with thoughts and beliefs as well; and it was on the basis of precisely this distinction that the Hatch Act was upheld. See 330 U. S. at 100.

Moreover, the effect of the non-communist affidavit provision is not merely to withhold from unions rights which they would not have anyway but for the National Labor Relations Act. On the contrary, it leaves non-complying unions worse off than they would be if the Act had not been passed, and deprives them of basic rights which long antedated the Act. For example, the Act outlaws the closed shop, but permits the union shop if certain onerous requirements are met. But even a union shop is forbidden if any officer of the union has failed to sign the non-communist affidavit. This is not the withholding from unions of a statutory privilege or remedy: it is the taking away, if they do not surrender basic civil rights, of other rights which they have long enjoyed.

Again—

“to deny a union the opportunity to appear before the Board and have its name put on the ballot in a representation proceeding does not merely withhold a benefit, but sets in motion restrictions which would not exist if the Board had not been established. A union which is able to meet the requirements of 9 (h) will have the field to itself in a representation proceeding, and its name alone will appear on the ballot, even though another unqualified union previously represented, or was seeking to represent, the same employees. The practical advantage which this would give the qualified union is obvious. Moreover, if it won the election, its unqualified competitor would no longer be free to bargain even for its own members, and if the competitor took economic action to secure recognition, it would be guilty of an unfair labor practice preventable by injunction under 8 (b) (4) (C). In short, the combined effect of all these related provisions is to put unqualified unions in a worse position than if there were no NLRB.”

Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harvard Law Review 1, 35.

2. Even apart from the government's failure to make any showing of clear and present danger, such as would support



some curb upon the freedom of speech and assembly normally protected by the First Amendment, Section 9 (h) does not meet the standards with which legislation restricting civil rights must comply. It is not narrowly drawn to meet the evil purportedly aimed at; it strikes at opinions and beliefs, and not merely at advocacy or expression; and it is vague and indefinite. These deficiencies present substantial issues under the First and Fifth Amendments, which this Court should review.

Statutes restrictive of civil rights protected by the Constitution are to be upheld, if at all, only if they are "narrowly drawn to cover the precise situation giving rise to the danger." *Thornhill v. Alabama*, 310 U. S. 88, 105; *Schneider v. New Jersey*, 308 U. S. 147, 162. The evil to which section 9 (h) is directed is, according to the Board, the utilization of labor organizations, by officers of such organizations holding the proscribed political beliefs, to foment industrial strikes for political purposes. But the legislation does not, in fact, direct itself to this claimed danger. This is not a statute which regulates, limits or prohibits a particular kind of strike. Unions, whether they file the affidavits or not, are left free to conduct political strikes—that is one of the few rights left them. The statute attacks belief, not conduct.

Finally, we wish to urge that Section 9 (h) is so vague in describing the political beliefs which it proscribes as to violate the due process clause of the Fifth Amendment; and that even if it is not, viewed as a regulatory measure, so vague as to fall within the ban of the due process clause, its vagueness nevertheless condemns it under the stricter standards of definiteness which the First Amendment imposes on statutes restrictive of free speech and which the due process clause requires of criminal statutes. *Winters v. New York*, 333 U. S. 507, 509-510. For brevity we do not fully develop this point here, but will urge it if the petition is granted. Likewise we wish to reserve the right to argue that Section 9 (h) violates the First and Fifth Amendments by using the standard of guilt by association, i.e., membership, affiliation, or support.

3. The contention that Section 9 (h) constitutes a bill of attainder, within the meaning of Article I, Section 9, Clause 3



of the Constitution, presents a substantial and important issue of constitutional law which should be reviewed by this Court. The decision of the majority below, rejecting the contention, is, moreover, in conflict with the principles laid down by this Court long ago in *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, and recently reaffirmed in *United States v. Lovett*, 328 U. S. 303.

Here, just as in the *Cummings* and *Garland* cases, persons engaging in a particular occupation are required to take an expurgatory oath. And here, just as in those cases, the requirement was imposed by Congress for the purpose of driving out of the occupation in question those who would not, or could not without subjecting themselves to prosecution, take the oath.\* Again, here, as in those cases, the oath is addressed to opinions, beliefs and sympathies.

That the statute operates by putting pressure on union members to remove the proscribed officials, rather than by banning them directly, does not take it out of the class of a bill of attainder. For the earmark of an attainder is punishment by legislative fiat, without judicial trial. To make decisive whether the punishment is imposed directly, or through others who are coerced into administering it, would exalt form at the expense of substance. The assertion of the majority below that Section 9 (h) "operates not to impose punishment but to safeguard important public interests against potential evil" (Company App. 440) could with equal justification have been made of the expurgatory oath requirements involved in the *Cummings* and *Garland* cases. That exclusion from a particular profession is a "punishment" which may be imposed, if at all, only by courts and not by legislatures was the precise holding of those cases, and of the *Lovett* case as well.

4. While no conflict of decisions has yet arisen, the cases thus far decided show considerable diversity of opinion among lower court judges on the constitutionality of Section 9 (h). In the present case two judges (Minton and Kerner) upheld

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\* "The assumption is that if the facts are known through this filing procedure, union members will soon remove Communists from leadership rather than allow themselves to be precluded from enjoying the benefits of the Act." *Northern Virginia Broadcasters, Inc.*, 75 N.L.R.B. No. 2.

the statute, while Judge Major thought it unconstitutional. The *American Communications Association* case was heard before a three-judge district court (S.D.N.Y.), with two judges (Swan and Coxe) upholding the constitutionality of 9 (h), and one judge (Rifkind) holding it to be unconstitutional. In *National Maritime Union v. Herzog*, 78 F. Supp. 146 (Dist. Col.), also, two of the judges (Miller and Laws) of the three-judge district court upheld the statute, while the third (Prettyman) was of the view that it is unconstitutional. This Court affirmed the *Herzog* decision *per curiam*, without ruling upon the validity of Section 9 (h). 334 U. S. 854.

5. The issue of the constitutionality of Section 9 (h) is of great importance to unions and union members. Among the unions which have not complied with Section 9 (h), as of November 22, 1948, are:

	Estimated membership <sup>1</sup>
United Steelworkers (CIO)	928,670
United Mine Workers (Ind.)	600,000
Electrical, Radio & Machine Workers (CIO)	505,000
United Mine, Mill & Smelter Workers (CIO)	108,625
International Typographical Union (AFL)	92,530
United Public Workers of America (CIO)	86,000
Longshoremen's & Warehousemen's Union (CIO)	75,000

Thus more than 2,000,000 union members are at the present time being denied the protection of the National Labor Relations Act, and subjected to other disadvantages heretofore discussed, because one or more of the officers of their union has refused to file the non-communist affidavit. In the present case Philip Murray and other officers of the Union have refused, as a matter of principle, and pending a decision of this Court, to comply with the statutory requirement, because they think it violates important constitutional rights of unions, their officers and members.

This uncertainty as to the provision's status, with the consequent loss of rights under the National Labor Relations Act,

<sup>1</sup> These figures are taken from Bulletin No. 937, U. S. Dept. of Labor, Bureau of Labor Statistics (June, 1948), with the exception of that for the United Electrical, Radio and Machine Workers, which is that union's own estimate given to counsel for petitioners.

should be dispelled as soon as possible by a decision of this Court.

### CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted; and it is further requested that this case be set down for argument at the same time as *American Communications Association v. Douds*, No. 336, this Term.

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November, 1948.

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IN THE

# Supreme Court of the United States

October Term, ~~1948~~ 1949

No. ~~431~~ 13

**UNITED STEELWORKERS OF AMERICA, C. I. O., et. al.,**  
*Petitioners*

v.

**NATIONAL LABOR RELATIONS BOARD**

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF FOR THE PETITIONERS**

**ARTHUR J. GOLDBERG**  
**FRANK DONNER**  
**THOMAS E. HARRIS**  
*Counsel for Petitioners*

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**IN THE**  
**Supreme Court of the United States**

**October Term, 1948**

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**No. 431**

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**UNITED STEELWORKERS OF AMERICA, C. I. O., et al.,**  
***Petitioners***

**v.**

**NATIONAL LABOR RELATIONS BOARD**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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**BRIEF FOR THE PETITIONERS**

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**OPINIONS BELOW**

The opinions of the Court of Appeals (R. 82 and 110) are reported at 170 F. 2d 247. The decision and order of the National Labor Relations Board are set out at R. 1.

**JURISDICTION**

The decree of the Court of Appeals (R. 118) was entered in two separate proceedings for review of the Board's order, which had been consolidated in the court below (R. 77). One of these proceedings (No. 9612 below, No. 435 here) was brought by Inland Steel Company to review the order of the Board directing it to bargain collectively with respect to its pension and retirement policies. The other proceeding (No. 9634 below, No. 431 here) was brought by United Steelworkers of America, CIO, by its President, Philip Murray, Local Unions Nos. 1010 and 64, United Steelworkers of America, CIO, and members of United Steelworkers of America, CIO (herein collectively called the Union), to review a provision of the Board's order conditioning its effectiveness upon com-



pliance by the Union, within thirty days, with the requirements of Section 9(h) of the National Labor Relations Act. The decree below enforced the order of the Board in all respects.

The decree below was entered on October 28, 1948. On November 24, 1948, the Union filed its petition for certiorari in the present case, No. 431, to review the decision of the Court of Appeals in so far as it sustained the provision in the Board's order conditioning its effectiveness upon compliance by the Union with Section 9(h). This petition for certiorari was granted on January 17, 1949. The jurisdiction of this Court rests upon 28 U. S. Code § 1254, and upon Sections 10(e) and (f) of the National Labor Relations Act.

On November 26, 1948, the Company filed a petition for certiorari, No. 435, to review the decision of the court below enforcing the order of the Board that it bargain collectively with the Union with respect to its pension and retirement policies. This petition has not been acted upon by the Court.

### **QUESTIONS PRESENTED**

Section 9(h) of the National Labor Relations Act, as amended by the Taft-Hartley Act, subjects a union to certain penalties and disabilities unless each of its officers has filed an affidavit disclaiming belief in or affiliation with communism. Among the sanctions are: (1) The remedies otherwise available under the Act for the redress of unfair labor practices by employers are withheld; (2) The union shop is forbidden; (3) Certain types of strikes and boycotts, otherwise legal, are prohibited; and (4) Non-complying unions are excluded from participating in Labor Board elections, which are so conducted as to favor a competing complying union.

The question presented is whether Section 9(h) is unconstitutional, for any one of the following reasons:

(1) Because it deprives unions, union officers, and members of unions, of freedom of thought, speech, and assembly, in violation of the First Amendment, and of freedom to engage in political activity, in violation of the Ninth and Tenth Amendments, of the Constitution.

(2) Because it is vague and indefinite, and imposes tests



of guilt by association, in violation of the First and Fifth Amendments.

(3) Because it constitutes a bill of attainder, within the meaning of Article I, Section 9, Clause 3, of the Constitution.

The two latter bases for challenging the provision's constitutionality are fully covered in the briefs for the Appellants in No. 336, and, for the sake of brevity, only the first point will be covered in this brief.

### **STATUTE INVOLVED**

The pertinent provisions of the National Labor Relations Act are set out in the Argument.

### **STATEMENT**

Upon the basis of an amended charge filed on August 16, 1946, the National Labor Relations Board issued a complaint, dated August 19, 1946, against Inland Steel Company, alleging that the Company had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act.

On January 8, 1947, the Trial Examiner issued his intermediate report finding that the Company had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, including bargaining collectively with the Union with respect to its pension and retirement policies.

The Taft-Hartley Act, the "Labor Management Relations Act, 1947" (Public Law 101, 80th Congress, 1st Sess., 61 Stat. 136, 29 U.S.C.A. Sec. 141 *et seq.*) became effective on August 27, 1947. It re-enacted and amended the National Labor Relations Act. Among the provisions added to the old Act by the Taft-Hartley Act are Sections 9(f), (g) and (h). Section 9(h) provides in part as follows:

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor

organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

Section 9(f) and (g), which are not involved in this case, impose upon labor organizations certain obligations, subject to the same sanctions as are imposed by Section 9(h), to file information with the Secretary of Labor relating to the finances of labor organizations, their internal affairs and structure.

On April 12, 1948, the Board sent to the parties by mail its decision and order (R. 1). The Board's order is prefaced by the following statement (R. 20):

The Union has not complied with the provisions of Section 9(f), (g) and (h) of the amended Act. Our remedial order therefore shall be in part conditioned upon its complying with that section of the amended Act, within 30 days from the date of the order herein.<sup>1</sup>

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<sup>1</sup> In thus conditioning its order the Board cited *Matter of Marshall & Bruce Co.*, 75 N.L.R.B. 90, where the Board held that, while the failure of a union to comply with Section 9(f), (g) and (h) of the Act in a case based upon a complaint issued before the passage of the Act does not impair the power of the Board to issue remedial orders in view of the prospective language of the amendments to the Act, an order requiring an employer to bargain collectively with a labor organization looks toward a future relationship and is tantamount to a certification. The Board held therefore that it would not effectuate the policies of the Act to place the union in the position of a newly certified bargaining representative, unless and until it qualifies for certification. The Board stated:

We are convinced that Sections 9(f), (g) and (h) not only provide procedural limitations upon the Board's power to act with respect to cases arising after the effective date of the amendment, but also embody a public policy denying utilization of the Board's processes directly to aid the bargaining position of a labor organization which has failed to comply with the foregoing Sections. We cannot believe that Congress intended the full force of Goy-

The order, in brief summary, requires the Company to bargain collectively with the Union with respect to its pension and retirement policies if and when the Union shall have complied, within 30 days from the date of the order, with Section 9(f), (g) and (h). The Company is likewise ordered, subject to the same condition, to refrain from making any unilateral changes affecting the employees represented by the Union in its pension and retirement policies without prior consultation with the Union and to bargain with the Union with respect to its pension and retirement policies. The Company is also required by the Board's order to post certain notices for a period of 30 days following the receipt of said notices and, in the event of compliance by the Union, for 30 days thereafter.

On May 14, 1948, the Union filed with the Board a document (R. 56) entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board," in which the Union recited that it had complied with Section 9(f) and (g) of the Act within the time limitations prescribed in the Board's Decision and Order of April 12, 1948, and its Rules and Regulations.\* The Union further recited in its Re-

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ernment to be brought to bear upon an employer to require him to bargain in the future with a Union which we now lack the authority to certify. Therefore, inasmuch as this Union has not complied with Section 9(f), (g) and (h) and is not presently qualified for certification as bargaining representative, our remedial order in this proceeding shall in part be conditioned upon compliance by the Union with that Section of the amended Act, within 30 days from the date of the order herein.

We have not in this case challenged the Board's order on the ground that it applies the Taft-Hartley Act retroactively, since the decisions of the courts are unanimous that that Act is to be given effect, even in cases arising before its enactment, in the shaping of remedial orders which operate *in futuro*. *Young Spring & Wire Corp. v. N.L.R.B.*, 163 F. 2d 905 (Ct. App. D.C.); *Edward G. Budd Mfg. Co. v. N.L.R.B.*, 332 U. S. 840.

\*Under Section 203.86 of the Board's Rules and Regulations, it is provided:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Since the Board's order of April 12, 1948 was served upon the Union by mail, its Return of May 14, 1948 was timely.

turn that it had not complied with the requirements of Section 9(h) of the Act, as amended, for the sole reason that the provisions of Section 9(h) are illegal, unconstitutional and void. The Union therefore requested the Board to make its decision and order of April 12, 1948, unconditional in form and effect on the ground that the Union had complied with all of those provisions of Section 9 of the National Labor Relations Act, as amended, which are not illegal or unconstitutional.

Thereafter on May 17, 1948, the Board issued an order (R. 62) denying the Union's request that the Board's decision and order of April 12, 1948, be rendered unconditional in form and effect. On June 10, 1948, the Union filed in the court below a petition to review the Board's orders of April 12, 1948 and May 17, 1948, in so far as their effectiveness was conditioned upon prior compliance by the Union with Section 9(h) (R. 65). The Company likewise petitioned to review and set aside the Board's order in so far as it imposed obligations upon the Company. Thereafter the court below ordered the cases consolidated (R. 77).

On September 23, 1948 the court below rendered a decision upholding the order of the Board in all respects (R. 82, 110). The court was unanimous in sustaining the order in so far as it directed the Company to bargain collectively with the Union with respect to its pension and retirement policies, to post notices, etc. As respects the provision of the Board's order conditioning its effectiveness upon compliance by the Union with Section 9(h) of the Act, Judges Kerner and Minton held that the statutory provision is constitutional, while Judge Major (who spoke for the court on the balance of the case), was of the view that Section 9(h) is unconstitutional.

The Union and the Company each petitioned for certiorari. The Union's petition was granted on January 17, 1949, and the Court has not acted upon the Company's petition. (See Jurisdiction, *supra*, pp. 1-2.)



## SPECIFICATION OF ERRORS

The United States Court of Appeals for the Seventh Circuit erred:

1. In holding that Section 9(h) of the National Labor Relations Act is constitutional, and in failing to hold that that provision is unconstitutional.
2. In enforcing the provision of the order of the National Labor Relations Board conditioning its effectiveness upon compliance by the Union with Section 9(h) of the National Labor Relations Act.
3. In refusing to modify the Board's order by eliminating the provision conditioning its effectiveness upon compliance by the Union with Section 9(h).

## ARGUMENT

Mr. Philip Murray, the President of the Congress of Industrial Organizations and of the United Steelworkers of America, and the other officers of both of those organizations, have refused to file the affidavits required by Section 9(h) of the National Labor Relations Act. They have refused because they consider Section 9(h) to be a grave infringement upon the civil liberties of unions, union officers, and union members. They are not communists nor do they have any sympathy for communism or any desire to retain communists as officers of CIO unions. They have refused to file because, as a matter of principle, they decline to yield to what they regard as a major invasion of the constitutional rights of labor to freedom of thought, speech and assembly, and of political activity.

Communism has no firmer foe than Mr. Philip Murray. The United Steelworkers of America, of which Mr. Murray is President, has no communist officers.\* Not only are Mr. Mur-

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\* Article III, Sec. 4 of the Constitution of the United Steelworkers of America, CIO, reads as follows:

No member shall be eligible for nomination or election or appointment to, or to hold any office, or position, or to serve on any Committee in the International Union or a Local Union or to serve as a delegate therefrom who is a member, consistent supporter, or who actively participates in the activities of the Communist Party or of any Fascist, Totalitarian, or other subversive organization which opposes the democratic principles to which our Nation and our Union are dedicated.



ray and other influential leaders of the CIO effectively combating communist influences in unions, but the CIO has given strong support to the Marshall Plan and to ECA. Thus, the CIO's objection to Section 9(h) flows not from sympathy with communism, but from a devotion to civil rights and from a belief that unless the civil rights of communists are protected, those of others will not be.

This brief is addressed solely to the proposition that Section 9(h) of the National Labor Relations Act is unconstitutional because it deprives unions, union officers, and members of unions of freedom of thought, speech, and assembly, in violation of the First Amendment, and of freedom of political activity in violation of the Ninth and Tenth Amendments. There are, however, other substantial bases for challenging the constitutionality of Section 9(h), which are enumerated in this brief under "Questions Presented" *supra* (pp. 2-3), and which are fully covered in the appellants' briefs in *American Communications Association, CIO, et al., v. Douds*, No. 336 this Term. For the sake of brevity we adopt what is said in those briefs on these issues, and do not argue them separately.

## I.

### **Section 9(h) Heavily Penalizes Unions Which Have Officers With Proscribed Beliefs, in Order to Force Their Expulsion**

The Taft-Hartley Act, the "Labor Management Relations Act, 1947" (Public Law 101, 80th Congress, 1st Sess., 61 Stat. 136, 29 U.S.C.A. Sec. 141 *et seq.*) became effective on August 27, 1947.—It re-enacted and drastically amended the National Labor Relations Act. Among the provisions added to the old Act by the Taft-Hartley Act is Section 9(h), which reads as follows:

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contem-

poraneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports [sic] any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

The gist of this new Test Act is that union officers must fore swear certain proscribed political, or politico-economic, doctrines and associations. The beliefs and activities to be abjured are: (1) Membership in or affiliation with the Communist Party; (2) Belief in the overthrow of the government by force or by any illegal or unconstitutional methods; and (3) Membership in or support of any organization which believes in or teaches such overthrow. The required oath of disavowal will be referred to herein as the non-communist affidavit.

While compliance with Section 9(h) depends upon a union's officers, any one of whom can block compliance by refusing to execute the affidavit, the consequences of non-compliance fall directly only upon the union. These consequences are, in general, that the union loses certain rights under the Labor Relations Act, and is subjected to certain prohibitions—rights which are not taken from complying unions and prohibitions to which they are not made subject.

It is necessary to examine the precise character of the sanctions for non-compliance with Section 9(h) because of a peculiar argument made by the Board in support of the provision's validity. The Board asserts that the only consequence of non-compliance is that benefits otherwise conferred upon unions by the Act are withheld. The Board then goes on to argue that when Congress is dispensing favors, it raises no question under the First Amendment by conferring them upon some and denying them to others, but only a question under the due process clause of the reasonableness of the classification. This is so, the Board contends, even if the test for selecting or rejecting beneficiaries is their political or economic

beliefs. The Board then supports the validity of the statute under the due process test of reasonableness, asserting that it need not meet the clear and present danger test which is applicable to legislation restricting rights protected by the First Amendment.

Until it filed its brief in this Court in No. 336,<sup>4</sup> the Board had always conceded that the clear and present danger test could not be met with respect to Section 9(h), and had supported the validity of that provision solely by the argument summarized in the preceding paragraph. The Board now withdraws this concession, stating (footnote 35, pp. 52-53) that it never meant to make it and was merely misunderstood by lower court judges.<sup>5</sup> It still, however, devotes most of its brief, not to showing clear and present danger, but to arguing that it need not make such a showing and that Section 9(h) is sustainable under due process tests.

Even if Section 9(h) were enforced only by withholding benefits, the Board's argument that the use of a political test for selecting beneficiaries does not impair freedom of thought, speech and political activity would be wholly unsupportable under the decisions of this Court. That is fully demonstrated in the Appellants' brief in No. 336, at pp. 32-57, and will not be gone into in this brief.

What we shall seek to show in this portion of this brief is

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<sup>4</sup>References to the Board's brief are to be understood, unless otherwise stated, to be to its brief in No. 336.

<sup>5</sup>Judge Major, dissenting below in the present case, stated (R. 98):

The Board in effect concedes that this section cannot be justified by what the Supreme Court has characterized as the "clear and present danger rule."

Similarly, Judge Rifkind, dissenting in No. 336, noted that "indeed, on the argument the defendant disavowed the presence of clear and present danger." 79 F. Supp. 565.

In its brief in the First Circuit in *W. W. Cross & Company, Inc. et al. v. N.L.R.B.*, the Board entombed its position on clear and present danger in footnote 50 and in the following verbiage:

It is our view that although this legislation here under review was not predicated on the view that there existed a danger of violent overthrow of government warranting curbs on belief or expression of views, it does not follow that Congress did not believe that there existed a clear danger that the powers of the Act would be misused where labor unions were dominated by Communists.

that the Board's assertion that Section 9(h) is enforced only by withholding benefits is wholly misleading. We shall demonstrate, on the contrary, that the sanctions evoked by failure to file the affidavits impose upon a non-complying union penalties so heavy as to threaten its existence, leaving it no real alternative to expulsion of the officers whose beliefs offend 9(h). It follows that the statute must be judged as if it explicitly prohibited persons of the proscribed beliefs from serving as union officers.\*

In order to determine whether the sanctions underlying Section 9(h) amount to virtual compulsion, as we contend, or only to an inconsequential loss of statutory benefits, as the Board suggests, or to something in between, it is, of course, necessary to examine the totality of the sanctions which may be invoked for non-compliance. The Board contends that only the particular sanctions involved in these particular cases before the Court (the present case and No. 336) can be considered. This argument is no doubt sound as regards any contention that a particular method of enforcement is in itself unconstitutional. But in weighing the Board's overall contention that no element of coercion is involved in the enforcement of 9(h), so that no question under the First Amendment is raised, it is obvious that the statutory sanctions must be considered in their entirety in order to ascertain just what degree or kind of compulsion they do create.

That the compulsion to comply with 9(h) may be less than absolute—that an alternative to compliance may be at least theoretically open to a union—does not alter the character of the constitutional rights which are invaded. Just such an il-

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\*The Board makes no point of the fact that union officers' beliefs are ascertained by requiring them to file affidavits, rather than in some other way. None could be made: the exaction of a test oath, is, if anything, the very method of determining belief which is most offensive to civil rights, both because of its origin and frequent use as an instrument of tyranny and because of the element of self-incrimination. Cf. *Cummings v. Missouri*, 4 Wall. 277, and *Ex Parte Garland*, 4 Wall. 333.

As it passed both Houses, the bill did contemplate that the Board would determine whether union officers entertained the proscribed beliefs. It was changed in conference to avoid the administrative delay which that would have entailed. See 93 Cong. Rec. 6604. (References throughout to the Congressional Record are to the daily preliminary print.)



lusory alternative to compliance was urged in defense of the oath of allegiance required of children in *West Virginia v. Barnette*, 319 U. S. 624. It was argued there that parents could dispense with the government facility—that they had the option of sending their children to private schools, where the oath of allegiance would not be required. The majority of the Court passed this contention without comment, obviously viewing the expense of private schools as the equivalent of a direct sanction.<sup>7</sup>

#### **A. Section 9(h) Heavily Penalizes Non-Complying Unions**

1. *Withholding of Remedies Against Employers*—Section 9(h) directs the Board to withhold from non-complying unions the remedies otherwise available to them under the Act for the prevention and redress of unfair labor practices by employers.\* As to non-complying unions, employers are once more free to use the repressive practices by which they broke unions and prevented organization in the days before the Wagner Act was passed.

Literally, Section 9(h) only prohibits the Board from acting upon charges filed by non-complying unions, leaving it free to consider charges by individual members of such unions. However, even the Wagner Act gave the Board complete discretion, not subject to judicial review, as to whether to act on charges.\* By a Taft-Hartley amendment (Section 3(d)), that discretion was transferred from the Board to the General Counsel, whose dismissal of charges is now not reviewable even by the Board.

<sup>7</sup> The *Barnette* case also makes clear the irrelevance of *Hamilton v. Regents*, 293 U. S. 245, and *In Re Summers*, 325 U. S. 561, upon which the Board places considerable reliance. These cases involve the exclusion of conscientious objectors from a state university and from admission to a state bar. In the *Barnette* case, the court, speaking of the *Hamilton* case, said (p. 632):

That case is also to be distinguished from the present one because, independently of college privileges or requirements, the State has power to raise militia and impose the duties of service therein upon its citizens.

\* The language of Section 9(h) is that "no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10," unless the required affidavits are on file with the Board.

\* *Marine Engineers' Beneficial Ass'n. Local No. 33 v. N.L.R.B.* (C.C.A. 2, not reported below), certiorari denied 320 U.S. 777; *White v. N.L.R.B.*, 5 Labor Cases 62,742 (Ct. App. D.C. 1941) not officially reported. And see *Jacobsen v. N.L.R.B.*, 120 F. 2d 96, 100 (C.C.A. 3).



It is the General Counsel's normal practice to entertain charges filed by individuals alleging violations of Section 8(a)(3), and presumably 8(a)(1) and (4), but not those alleging violations of 8(a)(2) and (5). However, even as to charges of the former types, the General Counsel, sometimes, if the complainant's union is not in compliance, arbitrarily refuses to issue a complaint on the ground that the member acting for the union, even though it is the individual who is the primary victim of an unfair labor practice of this type. See e.g., *In re Times Square Stores Corp.*, 79 N.L.R.B. No. 100.

Moreover, only the union can complain of an employer's refusal to bargain with it. Non-complying unions which have for years been the certified bargaining representatives in particular plants, are thus now deprived of all legal remedy against the employers' refusal to bargain with them. This effect of Section 9(h) is strikingly illustrated by the present case and by *United Steelworkers of America v. N.L.R.B.*, now pending decision in the Court of Appeals for the First Circuit. In each of these cases the Union had for some years been the certified bargaining representative in the particular plant involved; the employer refused to bargain about certain subjects; the Union filed a charge with the Board; and, after a hearing, the trial examiner issued a report recommending that the employer be ordered to bargain with the Union on the issues in question. Each case stood in this posture when the Taft-Hartley Act was passed, and in each case the Board then conditioned its order upon compliance by the Union with the new Section 9(h).

Employers are not forbidden to recognize or bargain with non-complying unions; but, if the employer refuses, the union has no legal remedy under the Act. The result is that the employer, and not the government, decides whether the sanction of non-recognition is to be invoked against a non-complying union. For the government to discriminate against unions on account of the political and economic beliefs of their officers is bad enough. For it to delegate such power to employers is worse.

Whether a particular employer will decide to withdraw

recognition from a non-complying union will depend on several considerations. One is whether he can effectively alienate the support of the union members and others in the community from the union on the ground that the union leaders hold proscribed beliefs. Attacks by employers upon unions and unionism for "patriotic" reasons are, of course, not a novel phenomenon in the field of labor relations. The recent longshoremen's strike on the west coast took place because the employers were induced by 9(h) to believe that they could successfully refuse to deal with the existing leadership of the union. See *Fortune*, January 1949, p. 153. A second factor which will enter into the employer's consideration is whether the economic strength of the union is so great as to make it impracticable for him to withdraw recognition. For while a union has no legal remedy, it still, in some circumstances, has the right to strike or invoke other economic sanctions not prohibited by the Taft-Hartley Act.

Yet a third factor which may induce an employer to withdraw recognition from a non-complying union is the presence in the field of a competing union which is more acceptable to the employer. As explained below, the Board conducts its representation elections in such a fashion as virtually to insure the victory of a complying union. Thus, an employer can indirectly use non-compliance with Section 9(h) to influence its employees to reject a non-complying union and select its competitor. That, of course, is just what an employer is forbidden by Section 8(a) (2) to do directly.

2. *Outlawing of Union Shop.*—The consequences of non-compliance with 9(h) go far beyond the loss of legal remedies under the Act. Unions which are not in compliance with Section 9(h) are prohibited from entering into a union shop contract with an employer. That is effected in this way: the Act, by Sections 7, 8(a) (3), and 8(b) (1), prohibits the closed shop and permits the union shop only after the union has won a special type of election provided for in Section 9(e) (1) of the Act. And Section 9(h) provides that no such election shall be conducted at the behest of a non-complying union.

Not only the union shop, but the closed shop, was legal long before the Wagner Act. Indeed, this provision puts non-

complying unions under a restraint to which unions were never before subjected by federal legislation. A closed or union shop is the goal of every union. To prohibit the union shop to non-complying unions, while permitting it to complying unions, is to strike the former a deadly blow.

3. *Non-Complying Unions Excluded from Board Elections.*—The exclusion of non-complying unions from participation in Board elections, and the holding of these elections under rules which virtually insure the success of competing complying unions, are discussed in Appellants' brief in No. 336, at pp. 13-17. Here we wish to add only the most recent example of how the Board goes about permitting employees to designate bargaining "representatives of their own choosing" (Section 7).

In the proceeding referred to (*In re Woodmark Industries, Inc.*, 80 N.L.R.B., No. 171) the Board certified a complying union which received only 15 votes out of a total of 43 cast. Of the remaining votes, 11 were for no union and 17 were write-ins for a non-complying union which had theretofore been the bargaining representative. The Board voided the 17 write-in votes and certified the complying union, which was the only union on the official ballot, on the ground that it won a majority of the 26 valid ballots cast.

The write-in votes were not even given the status of votes against the complying union. If they were, the Board declared, the non-complying union would reap "an indirect benefit \* \* \* [from a Board election] as the result of having demonstrated its strength in such election and having secured the defeat of a complying labor organization properly participating therein."

This "election" strikingly resembles those held in the "Peoples' Democracies" of eastern Europe. Joyfully accepting the mandate of the 80th Congress to stamp out political unorthodoxy in unions, the Board reduces to a mockery the constitutional rights of workers to form and join labor organizations of their own choosing."

\* \* \* A more euphemistic description of what happens in these Labor Board elections is that of the congressional Joint Committee on Labor-Management Relations, in its Report issued December 31, 1948 (p. 35):

\* \* \* unions whose officers have complied had marked success in NLRB representation elections whereby they have supplanted the noncomplying union.

Theoretically, it is open to a non-complying union, faced with such an election, to persuade the employees to reject its complying competitor by voting for no union, and then, by using its economic strength, to induce the employer to bargain with it. Practically, such a course is most difficult. In an election in which the ballot offers only the choice between the complying union and no union, the employees usually will choose the complying union, rather than vote for no union at all, even though they would choose the non-complying union if they were given that choice. The choice between a complying union and no union is not a free choice, if what the employees want is to be represented by a non-complying union.

This is not a withholding of statutory benefits: it is a direct interference with the constitutional right of self-organization. See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33-34; *Thomas v. Collins*, 323 U. S. 516, 539. Such interference is not limited to the holding of rigged elections. It is implemented also, in the statutory provisions to which we next come, by penalizing non-complying unions and protecting complying unions.

It may be said, and with accuracy, that nothing in the Act requires the Board to go to such lengths in discriminating against non-complying unions. In fact, all that the Act specifically requires with respect to representation proceedings is that they not be entertained upon the application of a non-complying union. As far as the language of the Act goes, it would be open to the Board to place non-complying unions on the ballot, or to conduct elections upon the applications of members of non-complying unions.

However, if the Act does not require the Board to engage in its crusade against non-complying unions, it at least leaves it open to the Board to do so. And the congressional Joint Committee on Labor-Management Relations, which has had the Board's operations in this respect under continuous survey (see *infra* pp. 20-22), has, needless to say, uttered no word of criticism of the Board's zeal in enforcing not merely the literal language of 9(h) but the policy underlying it.

In a statute involving restraint upon freedom of speech,



indefiniteness as to how far the officials administering it may go in applying it is particularly vicious. That was pointed out by this Court in *Thomas v. Collins*, 323 U. S. 513, 536-537. One reason the statute there involved was stricken down was that a union organizer could not know, with that statute on the books, in what kind of conduct, or even abstract advocacy, he could safely engage. See also *Winters v. New York*, 333 U. S. 507, 509-510.

4. *Certain Strikes or Boycotts by Non-Complying Unions Prohibited*—In three types of situations the Act makes illegal and creates novel and drastic sanctions against strikes or boycotts by non-complying unions while permitting them by complying unions. These provisions operate not only for the protection of employers but of complying unions which have won "elections" of the sort just described.

Section 8(b)(4)(B) makes it an unfair labor practice for a union to engage in a strike or boycott against one employer for the purpose of requiring another employer to recognize a union, unless that union has been certified as the bargaining representative under the Act. Since a non-complying union cannot be certified, the effect of Section 8(b)(4)(B) is to deny to every non-complying union the aid, by strike or boycott, of other labor organizations, in seeking bargaining rights. Prior to the enactment of Section 9(h), and prior to the Wagner Act as well, labor organizations supported each other in striving for recognition. Now the Act denies such support to non-complying unions, while permitting it to complying certified unions.

Section 8(b)(4)(C) makes it an unfair practice for a union to strike to compel recognition if another union has been certified. This provision, obviously, is for the protection of complying unions which have won "elections" in which competing non-complying unions have been excluded from the ballot. The non-complying union, having been barred from the election, is also denied the use of its economic weapon—a strike. And the complying union, having had the benefit of a one-ticket election, is given an additional protection which it would not need if it were actually the free choice of the employees. Here, again, non-complying unions are prohibited



from engaging in conduct which was legal before Taft-Hartley.

Section 8(b)(4)(D) prohibits a union from striking to secure the assignment of particular work to its members, unless it has been certified as the representative for employees performing such work. Once again, activities which were legal in the absence of statute, and which continue to be legal for certified complying unions, are outlawed when undertaken by organizations which have not complied with Section 9(h).

The summary injunction procedure created by Section 10(1) of the Act may be invoked against strikes or boycotts prohibited by Section 8(b)(4)(B) and (C); and such strikes and boycotts, and those prohibited by 8(b)(4)(D) as well, are also declared to be illegal for the purpose of suits for damages by employers."

The cumulative effect of all of these provisions upon a non-complying union is obviously very great. As stated by Judge Prettyman, dissenting, in *N.M.U. v. Herzog*, 78 F. Supp. 146, 179 (D.C., D.C., 1948), it may be doubted whether a non-complying union can permanently survive. At the least, unions are placed under exceedingly strong compulsion to comply with Section 9(h), and to expel union officers who cannot or will not sign the required affidavit. That was precisely the purpose of Congress in enacting 9(h).

## ***B. The Purpose of Congress Was to Force Unions to Expel Officers Having the Proscribed Beliefs***

1. *Legislative History*—Section 9(h) was enacted specifically "to prevent Communists from being officers of labor unions." (Senator Ball, 93 Cong. Rec. A3233). Congress did not conceal its purpose: numerous assertions during Congressional debate like that just quoted are assembled in Appellants' brief, in No. 336, at pp. 41-44. Further demonstration of the point seems unnecessary, and the following discussion seeks only to clarify the general outline of the legislative history.

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"Section 303(a) repeats the prohibitions of Section 8(b)(4); and Section 303(b) provides that anyone injured by any violation of (a) may sue in any federal district court and recover the damages sustained.

Section 9(h) originated as Section 9(f) (6) of the House bill. As reported out by the House Committee, it contained no requirement for filing affidavits, but provided that the Board shall not certify a union any of whose officers is a member of the Communist Party, etc." The House bill also contained a provision, which was Section 8(c) (6), prohibiting unions from expelling members except upon certain specified grounds, one of which, subsection (D), was being a member of the Communist Party, etc.

Referring to these two provisions, the House Committee Report (No. 245, 80th Cong., 1st Sess., pp. 38-39) stated:

*Section 9(f)(6).*—At least 11 great national unions and a large number of local unions seem to have fallen into the hands of Communists, although in every case Communists appear to compose only a very small minority of the membership. In most of these cases the rank and file object to communistic influence in their unions. By the bill of rights set forth in section 8(c), the bill helps them to rid themselves of communistic control. Section 9(f) (6) makes it incumbent upon union leaders who now tolerate Communist infiltration in their organizations, affiliates, and locals, and temporize with it, to clear house or risk loss of rights under the new act.

• • • Communists use their influence in unions not to benefit workers, but to promote dissension and turmoil. They should be weeded out of the labor movement.

It was presumably because of the presence of Section 8(c) (6) (D) in the House bill that it was several times asserted during the House debates (see Appellants' brief, in No. 336, at pp. 41-42) that the bill would "drive Communists out of our labor organizations" (Congressman Hartley, 93 Cong. Rec. 3705), and not merely that the bill would drive out labor officers

<sup>19</sup> Section 9(f) (6) was amended in the House to apply to any officer who "is or ever has been" a member of the Communist Party, etc., the amendment being adopted by a vote of 153 to 10. It was later dropped in conference:

The "ever has been" test that was included in the House Bill is omitted from the conference agreement as unnecessary, since the Supreme Court has held that if an individual has been proved to be a member of the Communist Party at some time in the past, the presumption is that he is still a member in the absence of proof to the contrary. [Report No. 510, 80th Cong., 1st Sess., p. 49.]

who were Communists.<sup>13</sup> Section 8(c) (6) was, however, dropped in conference, its place being taken by a provision in Section 8(a) (3) that even under a union shop contract an employer shall not discharge an employee who is expelled from a union for any reason other than non-payment of dues. The subsequent discussion concerning what had become Section 9(h) (see Appellants' brief, in No. 336, at pp. 42-44) was, hence, more sharply focused, both in the Senate and in the House, and was explicit that it was "The provision to keep communists out of leadership of unions \* \* \*." (Representative Engel, 93 Cong. Rec. A2803.)

2. *Joint Committee Report*—Title IV of the Taft-Hartley Act created a Joint Committee on Labor-Management Relations, for the purpose of studying labor-management relations, including the operation of the Act. This Committee has found that Section 9(h) has been quite effective in achieving its purpose of forcing unions to remove communistic officers. Its report dated March 15, 1948, stated (Senate Report No. 986, 80th Cong., 2nd Sess., pp. 10-11):

Officers of a large majority of labor organizations have complied with the filing requirements. In many instances, unions have taken decisive action to compel reluctant officers to comply with the filing requirements. Recent newspaper accounts report action by the International Ladies Garment Workers Union (AFL), the United Furniture Workers (CIO), and the United Shoe Workers (CIO), to cleanse their organizations of officers who are not willing, or are not able, to file the necessary affidavits.

\* \* \*

A few large labor organizations, such as the United Electrical Workers of America (CIO), the United Steelwork-

<sup>13</sup> An additional statement to the latter effect is that of Representative Bell (93 Cong. Rec. 3704):

Mr. Chairman, this is a correcting amendment to paragraph 6 on page 33 which provides that any person who is a Communist or belongs to certain Communist organizations shall not be an officer in a union. I am in thorough accord with the purpose of that paragraph which is to protect the future of this country against the impending danger of having communists in control of our great American labor organizations.

This bill was regularly spoken of as barring or excluding Communists from serving as officers of unions. See e.g. statements of Representative Mundt, 93 Cong. Rec. 3706-7; Representative Crawford, 93 Cong. Rec. 3706.

ers of America (CIO), and the United Mine Workers of America, independent, have announced it as their policy that they would not comply with the filing requirements of the act. Some evidence of membership dissatisfaction with the policy of boycotting the processes of the National Labor Relations Board has been noted. For example, a New York local of the United Electrical Workers, Local 1237, is reported to have withdrawn and formed an independent mechanical and electrical workers' union in order that it might have the protection afforded by the new act. Also, in St. Louis, a large segment of the Retail, Wholesale and Department Store Employees Union (CIO), seceded from that union to form a new independent union and took quick steps to comply with the act. In Pittsburgh, the State liquor store employees broke away from the United Public Workers (CIO) to form an unaffiliated union. Other unions which have not yet complied are bringing themselves within the protection of the act. Recently the CIO's union of Marine and Shipbuilding Workers, with an estimated membership of more than 100,000, voted to comply with the affidavit and registration requirements.

The committee hopes that within the very near future all labor organizations in the United States will be persuaded of the benefits which the procedures under the Taft-Hartley Act hold out for them and will take the necessary steps to avail themselves of the benefits and peaceful procedures offered by the law.

The Joint Committee's final report, issued December 31, 1948, likewise states (p. 3):

Elimination of Communist partisans and adherents from official posts and positions of responsibility in both national and local unions is one of the most pronounced and significant effects of the Labor Management Relations Act, 1947. There are still unions, in a steadily declining number, however, whose officials have not filed non-Communist affidavits in compliance with the law. A number of unions have fully met this provision with the ouster of officials who have failed to meet this statutory requirement.

Again (p. 35):

In many instances, unions have taken decisive action to compel reluctant officers to comply with the filing requirements. Refusal by incumbent officers to make the



affidavit has been an issue in a number of union elections which resulted in such officers being denied reelection.

## II

### **By Penalizing Unions for Having Officers With Proscribed Beliefs, Section 9(h) Impairs Basic Civil Rights Protected by the Constitution**

Freedom of political thought and action separates democracy from despotism, or, to use a term currently more popular, totalitarianism. Any system of free government must recognize the right of people to determine for themselves what they believe in—and to act on their beliefs. If political freedom is to be preserved in this country, these rights must be zealously safeguarded. Fear of a foreign police state must not be the excuse for degenerating into one here. It is not enough to hate communism, as did the Congressmen who enacted Section 9(h). We must love democracy as well, understanding that its essence is the right of the people freely to choose among competing political and economic beliefs.

The question before the Court is the constitutionality of a statute which is designed to force unions to remove officers who do not foreswear certain proscribed political and economic beliefs, and which subjects unions to various onerous penalties unless they do remove such officers. Such a statute, we submit, infringes the most fundamental civil rights of unions, union members, and union officers; and can be sustained only if the criteria for testing the validity of legislation invading freedoms normally protected by the First Amendment are met.

#### ***A. Section 9(h) Restricts Unions and Members of Unions in Their Exercise of Freedom of Thought, Speech and Assembly, and of Political Activity***

Under the political systems which have developed in the democratic countries, effective action in the political field means group action—action through political parties, labor unions, and other associations." The right to create, to solicit

"The unique contributions of voluntary associations, other than political parties, to the formation and strengthening of democratic processes and institutions in the United States has been the subject of fre-



others to join, and to act through such organizations is protected by the Bill of Rights. It is the form which the freedom of assembly of earlier times takes in a more populous country and a more complicated society. Such groups often afford the only effective vehicle for the exercise of free speech.

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, \* \* \* and therefore are united in the First Article's assurance. [*Thomas v. Collins*, 323 U.S. 516, 530].

quent comment. On the significance of groups in American life, see Schlesinger, *The Rise of the City—1878-1898* (1933), pp. 409-410; Bryce, *The American Commonwealth* (1910), p. 294; de Tocqueville, *Democracy in America* (1900), pp. 114-118. On the vital role played by voluntary groups in the founding of the American republic, see Van Tyne, *The Causes of the War of Independence* (1922), pp. 373, 374-376, 427-428 (Committees of Correspondence).

On the contributions of groups and voluntary associations in particular fields, see

#### Race Relations:

Hobbs, *The Antislavery Impulse* (1933); McMaster, *History of the People of the United States* (1895), Vol. II, p. 21; Myrdal, *An American Dilemma* (1944), Vol. II, pp. 810-857;

#### Peace Movements:

Curti, *American Peace Crusade* (1929); Schlesinger, *The Rise of the City* (1933), pp. 365-366;

#### Economic Relations:

Hinds, *American Communities and Cooperative Colonies* (1908); Noyes, *History of American Socialisms* (1870); Adams, ed., *History of Cooperation in the United States*, Vol. VI, Johns Hopkins Studies in Historical and Political Science (1888);

#### Women's Rights:

Schlesinger, *New Viewpoints in American History* (1926), pp. 126-160;

#### Public Schools and Adult Education:

Curti, *The Growth of American Thought* (1943), pp. 349-352, 596-597; Post, *Popular Free Thought in America* (1943), p. 87;

#### Land Reform and Colonization:

Zahler, *Eastern Workingmen and National Land Policy* (1941); McMaster, *op. cit.*, Vol. VI, p. 109;

#### Agricultural Associations:

Oberholtzer, *A History of the United States Since the Civil War* (1926), Vol. III, pp. 102-109; Hicks, *The Populist Revolt* (1931);

#### Humanitarian and Related Movements:

Elsh, *Rise of the Common Man* (1927), pp. 259-260; Stewart, *The National Civil Service Reform League* (1929); Nevins, *The Emergence of Modern America* (1927), p. 334; McCrea, *The Humane Movement* (1910).

With the increased participation of government in our economic life, workers are forced to go into politics, through their unions, in order to preserve their economic security and standard of living. Just as individual workingmen must act in concert if they are to further their economic interests, so they must express their political views through the spokesmen for their group if they are to exercise their political freedom effectively.<sup>15</sup> If an individual is helpless in dealing with his employer, then how can it be said that he is more able to deal with the powerful employer-dominated political interests which, unless restrained, can decisively fix or alter the terms and conditions under which he must live? In sheer self-protection he must associate with others in order to preserve those political values which enforce and promote his economic interests. He must organize politically in order to defend against political attack the gains achieved through his economic strength. He must organize politically in order to meet the organized political attack of other interests in our national life.

<sup>15</sup> The best available account of the forces which have stimulated labor's political activities is Taft, *Labor's Changing Political Line*, 43 *Journal of Pol. Ec.* 634 (1937).

The following texts document the historic role of labor in American political life:

Beard, *The American Labor Movement, A Short History* (1935), pp. 33-46, 54-61, 80-85, 103-112, 165-171; Bimba, *The History of the American Working Class* (1927), pp. 84-89, 204-208, 323-330; Carroll, *Labor and Politics* (1923), pp. 27-54, 80-138; Childs, *Labor and Capital in National Politics* (1930); Commons and Associates, *History of Labor in the United States*, Vols. I and II (1918), Vol. I, pp. 169-335, 369, 454-471, 522, 535, 548-559; Vol. II, pp. 85-109, 124-130, 138-146, 153-155, 168-171, 240-251, 324, 341-342, 351-353, 461-470, 488-493; Daugherty, *Labor Problems in American Industry* (1933), pp. 622-629; Foner, *Labor Movement in the United States* (1947), pp. 104-105, 130-134, 140, 149-166, 210-217, 245-248, 262-263, 334-336, 357-359, 372-373, 423-429, 475; Gaer, *The First Round* (1944), p. 49; Harris, *American Labor* (1938), pp. 33-55, 65-69; Hoxie, *Trade Unionism in the United States* (1917), pp. 78-102; Lorwin, *The American Federation of Labor* (1933), pp. 88-93, 123-126, 221-226, 351, 397-425; Millis and Montgomery, *Organized Labor* (1945), pp. 7, 10, 27, 29-31, 34, 42n, 51, 52n, 54-55, 57n, 62, 67, 71, 81, 91, 108-111, 118, 123-129, 141, 143, 149, 178, 181-188, 232-238, 303-305, 311, 313, 317-320, 348-349, 600, 669, 829, 890; Perlman, *A History of Trade Unionism in the United States* (1929), pp. 146-160, 285-294; Perlman and Taft, *History of Labor in the United States, 1896-1932* (1935), pp. 150-166, 525-537; Schlesinger, *The Age of Jackson* (1945), pp. 132-158, 180-185; Walsh, *C. I. O., Industrial Unionism in Action* (1937), pp. 248-271; Ware, *The Labor Movement in the United States, 1860-1895* (1929), pp. 350-370; Ware, *The Industrial Worker, 1840-1860* (1924), pp. 154-162.

And he must organize politically in order to safeguard and promote his right to form and join unions and his right to bargain collectively and to strike."

Leaders of modern labor organizations are necessarily participants in the political life of their local community, of their state, and of the nation. They express the political views of their organizations. They consult with and are consulted by other organizations and individuals. They lend support to joint projects and they ally themselves with others to induce the passage of legislation and to achieve other political goals. They participate in political planning and election campaigns. They take part in government administration and in the shaping of government policy, as in the case of the tripartite National War Labor Board and National Wage Stabilization Board, in which labor leaders represented the labor point of view. And they exert an influence in political affairs commensurate with the size of the labor organizations which they head.

Members of labor organizations, aware of the important role of their union in political life, are influenced in their choice of union officers by the political views and beliefs of the candidates. For workers, freedom of thought, speech and assembly and of political activity means freedom of work in unions and through leadership of their own choosing. As established by *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33-34—

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents.

Section 9(h) penalizes unions, and through them their members, for selecting as officers persons having the political beliefs which Section 9(h) proscribes. To tell union members that they cannot have as officers persons of a particular political persuasion restricts their freedom of political activity through the very instrumentality—the union—which is peculi-

\* One of the most powerful factors which brought labor into political life was the evil of "Government by Injunction." Lorwin, *The American Federation of Labor* (1933), pp. 88, 90.

arly adapted to serving as a vehicle for worker expression, both in the political and, if they can be separated, economic fields.

A more direct interference with the freedom of union members—freedom of speech, of assembly, and to engage in political activity, is hard to imagine. Let us take, for example, the case of a union, the majority of whose membership is communist. Section 9(h) prohibits these workers, on pain of onerous penalties to their union, from selecting as their officers persons adhering to the same political party as themselves. Union members are entitled to choose officers whose political beliefs are acceptable to them—not to the Congress. That right cannot be taken away without raising the gravest constitutional issues.

***B. Section 9(h) Restricts Union Officers in Their Exercise of Freedom of Thought, Speech and Assembly, and of Political Activity***

The plain purpose and effect of Section 9(h) is to prevent persons of designated political and economic views from serving as union officers. Thus the statute strikes directly at the freedom of belief, speech, and political activity of union officers. And persons who have exercised these constitutionally protected freedoms in a fashion unacceptable to Congress are, in consequence of their unorthodoxy, denied yet another right essential to the expression and effectuation of their beliefs—the right, if the membership agrees, to be an officer of a labor union. Thus they are excluded from the very positions in which they might give effective expression to their views—and that, of course, is why they are excluded.

In view of this gross infringement of the civil rights of union officers, it is with a feeling of apology that we point out that they also lose their jobs. This consequence of Section 9(h) is, however, particularly relevant to the Board's argument that the only sanction of Section 9(h) is to withhold from unions benefits otherwise made available under the statute. As to unions this argument is factually misleading and legally irrelevant: as to union officers it is preposterous. They are not denied a benefit: their unions are put under pressure to fire them. Cf. *Truax v. Raich*, 239 U. S. 33.



## III

### Civil Rights May Be Limited Only When Their Exercise Creates Clear and Present Danger to a Paramount Public Interest

In the language used by Mr. Justice Holmes in first enunciating the now famous test, freedom of speech can be restricted only if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils the Congress has a right to prevent." *Schenck v. United States*, 249 U. S. 47, 52. He spoke in 1919, at the outset of the red scare which followed the first World War. As national hysteria thereafter mounted, the Court, notwithstanding strong dissents by Justice Holmes and Justice Brandeis, seems to have wavered in its adherence to the clear and present danger test. *Schaefer v. United States*, 251 U. S. 466; *Gitlow v. New York*, 268 U. S. 652.

In more recent years, however, the Court has returned to that test, and has stressed with ever increasing firmness the strong showing of necessity which must be made to uphold legislation which restricts freedom of belief or thought or speech. Thus in *Bridges v. California*, 314 U. S. 252, it said (p. 263):

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

And still more recently, in *Thomas v. Collins*, 323 U. S. 516, 530:

Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

In the *Thomas* case, incidentally, the Court rejected an argument very similar to that by which the Board here seeks to avoid the clear and present danger test. In that case the Court had before it a Texas statute which required organizers to secure an identification card from a state board before soliciting persons to join unions. The state, like the Board here, sought to avoid the clear and present danger test by urging



that the statute did not restrict free speech but regulated business practices, so that the test of its constitutionality was only whether it had a reasonable basis. This Court rejected the state's contention, and held that the clear and present danger test applied, stating (p. 530):

• • • It is the character of the right, not of the limitation, which determines what standard governs the choice.

The Court then went on to hold the statute unconstitutional.

Now, as after the first World War, the country is in a period of anti-red hysteria. In a mood far from dispassionate, and with scarcely a voice raised on behalf of ancient freedoms, the 80th Congress enacted Section 9(h)—avowedly for the purpose of driving out union leaders whose beliefs are too radical to be acceptable to Congress.

Surely so gross an invasion of fundamental civil rights is to be sustained only upon the clearest showing of necessity. That is not to say that the Congress is powerless to protect the country against real dangers. Even the gravest invasions of civil rights have been sustained, as in the Japanese removal cases, when thought necessary to protect the nation against imminent peril. But the danger must be real and the restriction on freedom necessary.

The Board's main reliance in this connection seems to be upon cases dealing with government employees, i.e., *United Public Workers v. Mitchell*, 330 U. S. 75; *Oklahoma v. Civil Service Commission*, 330 U. S. 127; and *Friedman v. Schwellenbach*, 159 F. 2d 22 (Ct. App. D. C.), certiorari denied 330 U. S. 838. The first two of these cases sustained, by a vote of 4-3, provisions of the Hatch Act restricting the political activity of government employees. The third case involved the discharge of an employee by the executive branch of the federal government under its so-called loyalty program.

The Hatch Act cases are wholly inapposite here. In the first place, government employees, according to the four majority justices, occupy a special relation with respect to the government, which permits the latter to regulate their political activities within reasonable limits. It can hardly be thought that union officials owe, or can have imposed upon

them, any similar duty to be politically neutral." In the second place, the Hatch Act regulates only political activities, while Section 9(h) deals with thought and beliefs as well. It was on the basis of precisely this distinction that the Hatch Act was upheld:

Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employees shall attend Mass or take any active part in missionary work." None would deny such limitations on Congressional power but because there are some limitations it does not follow that prohibition against acting as ward leader or worker at the polls is invalid. [*United Public Workers v. Mitchell*, 330 U. S. 75, 100.]

As regards the *Friedman* case, it has never been held that judicial review is available to employees discharged by the executive branch of the government. Political tests have been used since the earliest times in this country in the hiring and firing of government employees, and while the spoils system has been somewhat modified in favor of a civil service, the more important government jobs are still filled largely upon the basis of party loyalty. Therefore the discharge of an employee by the executive branch raises neither a constitutional question nor a justiciable issue, at least according to the notions accepted up until now. The so-called loyalty program obviously proceeds upon this assumption, since it makes no pretense of according to government employees even the rudiments of either substantive or procedural due process. See Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale L. Journal 1 (1948). Thus, the "loyalty" program can hardly be regarded as a precedent for determining the civil rights of persons who have not placed themselves in the special category of government employees. If it be so regarded, the Bill of Rights is as dead as the constitution of the Confederacy.

<sup>17</sup> In *Ex parte Garland*, 4 Wall 333, 378, the Court said:

The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States \* \* \*

## IV

**Section 9(h) Cannot Be Sustained Under the Clear and Present Danger Test**

These are times of international strain acerbated by the coincidence of national and ideological rivalries. If the activities of the Communist Party constitute a clear and present danger to the continued existence of the American constitutional system, threatening to overturn it by force or violence, or by treasonable adherence to a foreign power in time of war, the Communist Party can constitutionally be outlawed.

Thus far, however, the judgment both of the country and of the Congress has been that so extreme a step is not warranted. Even the reactionary 80th Congress failed, after long consideration, to pass the Mundt-Nixon bill, and that bill would have stopped considerably short of outlawing the Communist Party. And even in the heat of the political campaigning last summer, the candidates of both major parties agreed that no such extreme step as outlawing the Communist Party should be taken.

The statute now under consideration, is, of course, narrower. It does not outlaw the Communist Party but seeks only to exclude members of that party and others entertaining certain described beliefs from serving as officers of labor unions. But that does not eliminate the need for careful and dispassionate scrutiny of the circumstances which were thought to justify the legislation.

Accordingly, we turn to consideration of the factual material which the Board offers as justifying Section 9(h). This is, incidentally, substantially the same material which was proffered by the Board in the various lower courts, not as showing clear and present danger but as establishing reasonableness of discrimination in singling out beneficiaries for government favors."

The legislative history of the Taft-Hartley Act shows that if it can be said that Congress was aiming at any specific supposed evil in enacting 9(h), that evil was political strikes.

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"The Board's assertion that it did not concede in the lower courts that it could not meet the clear and present danger test seems to be wholly unjustified. See *supra*, p. 10.

Union officers who are communists, might, Congress—or at least some members of the House—thought, cause political strikes.

This conclusion appears to have been based exclusively upon the testimony of Mr. Louis Budenz, a well-known former Communist, who testified before the House Committee which was considering the Taft-Hartley Act. He stated that a strike which occurred at the Allis-Chalmers plant, in Milwaukee, early in 1941, was precipitated by communist officers of the local, not to improve the economic position of the union, but on the instructions of the leaders of the American Communist Party, in order to hinder aid to Britain. And Budenz testified similarly with respect to a strike at the North American Aviation Company during the same period.

That was the only testimony specifically dealing with political strikes which was before the Congressional committee which considered the Taft-Hartley Act." Two strikes, six years before. These strikes, moreover, took place before the United States had entered the war—not during the war, as the Board would lead the Court to believe by misquoting the committee hearings."

\* In outlining the bill to the House, Congressman Hartley's explanation with respect to Section 9(f)(6)—the predecessor of 9(h)—was as follows (93 Cong. Rec. 3533):

It prohibits certification by the Board of labor organizations having Communist or subversive officers. If anyone doubts the need of that in the bill all you have to do is to read the testimony taken by our subcommittee in connection with the Allis-Chalmers strike in Milwaukee and you will understand that section of the bill is most in order.

Representative Kersten in supporting Section 9(f)(6) on the floor of the House, also used the Allis-Chalmers strike as his only specific justification for the provision. He rehearsed Budenz' testimony at considerable length. 93 Cong. Rec. 3577-8.

\* The Board (Brief, p. 27) quotes Harold W. Story, Vice-President of the Allis-Chalmers plant, as testifying that the strike, lasting 76 days, held up for that period delivery of power plants "to a plant that the government wanted to build to make powder during the wartime."

Actually the testimony was clear that the strike was called during the Spring of 1941, and that it lasted for 76 days. (Hearings before the House Committee on Education and Labor on Bills to Amend the National Labor Relations Act, 80th Cong., 1st Sess., p. 1384.) And the misleading language quoted by the Board was not that of Story, but of Congressman Clare Hoffman, a notorious labor baiter:

MR. HOFFMAN: And that strike held up your delivery of that



At that time opposition to aid to Britain was, if shortsighted, entirely legal. Such opposition was not confined to communist labor leaders—it was likewise engaged in by Representatives, Senators, and even some industrialists. It will surely be remembered that a large middle western automobile manufacturer refused an order from Britain for airplane engines, because, it was rumored, of his political viewpoint. Yet that, if true, would hardly be thought to render constitutional a statute designed to exclude Republicans or isolationists from operating industrial plants.

In addition to this specific testimony about two strikes which were assertedly called for political reasons, the hearings on the Taft-Hartley Act and the debates, particularly in the House of Representatives, were replete with vague but violent denunciations of communists, subversives, fellow travelers, party-liners, front organizations, etc., etc. These denunciations had no particular relation to Section 9(h) or its predecessor, and were sprinkled throughout the discussion of the entire Act. The House debates are also marked by vitriolic hostility to unions.\* A reading of this legislative history suggests that Congress was really motivated by general hostility to labor unions and to communism, and in enacting Section 9(h) sought to strike at their point of supposed conjunction. Political strikes occupied no very important place in the House discussion and were not so much as mentioned in the Senate. The Board's argument that Section 9(h) was enacted to meet the danger of such strikes is thus to some extent an improvisation, devised after the enactment of the statute in the subsequent attempt to justify it.

General denunciations of communism by prominent men are easy to find. We do not disagree with them. But they are not a basis for holding that the national security, or industrial peace, are gravely threatened by communist union officers. As stated in *Bridges v. California*, 314 U. S. 252, 263:

\* \* \* even the expression of "legislative preferences or beliefs" cannot transform minor matters of public machinery to a plant that the Government wanted to build to make powder during the wartime, for 76 days?

MR. STORY: That is correct. [Hearings, p. 1385.]

\* See, for example, the statements by Representatives Smith (93 Cong. Rec. 3473-4), Hoffman (*id.* 3538), Crawford (*id.* 3706).



convenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression.

In addition to the Budenz testimony which was before Congress, the Board relies upon material culled from such diverse sources as reports of the House Committee on Un-American Activities<sup>2</sup> and biographies and other writings of labor leaders. From these last the Board has quoted criticisms of the conduct of communist union officers in calling, or deciding not to call, strikes for reasons other than achievement of immediate trade union objectives. Several of these examples are of communist union leaders who assertedly refused to call strikes during the war, because, although it would have been advantageous to do so from a strictly trade union standpoint, it would have interfered with war production to the detriment of our then ally, Russia.

The Board has also quoted general statements by Congressmen and others to the effect that communist officers of unions have political, as well as economic objectives. That is, of course, equally true of union leaders who are Democrats or Republicans.<sup>3</sup>

These various materials, as the Board always recognized until it got to this Court, fall far short of the showing necessary to sustain a grave invasion of freedom of speech, thought,

<sup>2</sup> The Board states (Br., pp. 32-33) that a "new pamphlet," entitled "100 Things You Should Know About Communism and Labor" (Govt. Print. Office, 1948), has been issued by the Un-American Activities Committee based upon its "extensive hearings." And the Board quotes the pamphlet as listing some twenty unions which have "Communist leadership strongly entrenched."

Actually the portion of the new pamphlet quoted by the Board only purports to be quoting some unidentified 1944 statement by the same Committee that at that time the listed unions had "Communist leadership . . . strongly entrenched." The stars, indicating some omission in the Committee's 1948 quotation of its 1944 statement, were not included by the Board in quoting the pamphlet, and we have no idea what was omitted.

Thus the congressional Committee, noted for its irresponsible character, was pulling itself up by its own bootstraps, and the Board is asking this Court to uphold a grave invasion of civil liberties upon the basis of its misquotation of this sort of material.

<sup>3</sup> In this Court the Board also, for the first time, relies upon the experience of other countries with communist controlled labor unions (Br. 45-48). That is, of course, beside the point. The question is clear and present danger here.

and political activity. The most that they show, or tend to show, is that communist labor leaders have sometimes called strikes—or decided not to call them—in aid of objectives of the Communist Party other than advancement of the immediate economic interests of the union. And that is all that the materials do show.

They do not show, and Congress did not find (1) that political strikes are a clear and present danger to the security of the nation, or (2) that political strikes threaten widespread, or even substantial, industrial unrest. Absent such a showing, there is no basis for sustaining, under the clear and present danger rule, the heavy restraints laid by Section 9(h) upon traditionally protected freedoms.

There is, regrettably, no indication that Congress was even aware that in enacting 9(h) it was trenching upon constitutionally protected freedoms. Hence the provision was never considered there upon the basis of whether some grave evil existed which could be cured only at the cost of some impairment of freedom of thought, speech, assembly and political activity. Had Congress considered the issue in those terms, had it found that some substantial and immediate danger could be met only by restraining normally protected freedoms, a very different question would be presented to this Court.

But Congress proceeded in no such fashion. The House purportedly was disturbed about political strikes—though the last one cited to it had occurred in 1941. Political strikes, as far as we have found, were not even mentioned in the Senate. That body seems to have adopted 9(h)—after only the most perfunctory consideration\*—simply because it wanted to weaken the power of adherents of a party which it detested and distrusted. That these people might have constitutional rights was not so much as mentioned."

\* The provision was introduced on the floor of the Senate as an amendment, and was passed after only cursory discussion. See 93 Cong. Rec. 5095.

" With Congress so cavalierly abdicating its constitutional obligation to respect the political freedom even of unpopular minorities, it is not surprising to find that minor government functionaries are acting in the same way. Thus the Police Commissioner of Detroit is now requiring newspaper reporters covering police news to take an oath similar to that required by 9(h). The nation's newspapers, which have made no audible outcry against Section 9(h), have been quick to perceive the

The Board, in its defense of 9(h), has likewise found slight factual justification for impairing normally protected civil rights, and has groped for some sleight of hand argument by which to avoid consideration of the constitutional issues on their merits.

In this context, the issue before the Court is not a difficult one. It has simply no basis for sustaining 9(h): neither Congress nor the Board has supplied one. If it should hereafter appear that some major national interest is indeed gravely imperiled by the activities—not the beliefs—of communist labor leaders, it will always be open to Congress to enact, after adequate consideration, a measure genuinely designed to cope with the evil. And such a statute would present a question wholly different from that at issue here.

Even if political strikes were a grave threat to national security or industrial peace, a statute like 9(h) could not be sustained. The proper remedy would be to prohibit political strikes: not gratuitously to flout the guarantees of the First Amendment by barring members of a particular political party from serving as union officers. That union officers who are members of that party might sometimes resort to political strikes would not justify their expulsion from union office. For the supposed evil could be cured by a narrower remedy not involving political discrimination: that is, by forbidding political strikes.

Statutes restrictive of civil rights protected by the Constitution are upheld, if at all, only if they are "narrowly drawn to cover the precise situation giving rise to the danger." *Thornhill v. Alabama*, 310 U. S. 88, 105. But Section 9(h) does not limit itself to the claimed danger—political strikes.

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grave constitutional issues raised by the Police Commissioner's extension of 9(h)'s policy to them. See e.g., *N. Y. Times*, January 25, 1949, p. 26; *San Francisco Chronicle*, January 25, 1949, p. 18 (Editorial). The *Chronicle* editorial declares:

Since the Communist party is still a lawful political party in Detroit and throughout the country we are not ready to concede that membership in the party itself is legitimate ground upon which a city official may direct publishers to dismiss police reporters. But for a city official to establish the taking of an oath composed by himself as the test of whether a reporter may report upon certain phases of the public domain is an arbitrary and ominous restriction upon the freedom of the press.

The Taft-Hartley Act invalidates strikes for several purposes by unions not complying with 9(h), which are legal for complying unions. See *supra* pp. 17-18. But political strikes are not forbidden, even by non-complying unions.

The wholly indefensible character of 9(h) in this respect is strikingly demonstrated by the very argument which the Board (Bd. Br. 88-98) puts forward in its defense. This argument asserts initially that the Communist Party has a dual aspect: that while it is a political party it is also an organization utilizing "direct action," such as political strikes, to achieve its ends. The Board then concedes that the Communist Party is protected by the constitution in so far as it acts in its first capacity, viz., as a political party, so that adherence to its "political programs which are to be put into operation through governmental action" could not constitutionally be made the basis for government discrimination.

Such government action is itself constitutionally protected, with the result that belief in such action, though bearing a reasonable relation to the action, cannot be made a basis for classification. [Br. 90].

But, the argument continues, the Communist Party in its second aspect enjoys no such constitutional protection, so that its "direct action" program may be checked by precautionary legislation. Hence:

The appellants do not and could not successfully contend that political strikes are beyond the power of Congress to prohibit. [Br. 90].

All of this may be conceded, but it has no tendency to support 9(h). It is just when it reaches the point of fitting 9(h) into this pattern that the Board's argument collapses completely. For the final and decisive proposition in the Board's argument is that 9(h) does not strike at the political aspect of communism, but only as its "direct action" phase.

To the extent that the Communist Party is a political organization, it is left free and unrestrained. Section 9(h) is thus not concerned with the Communist Party as a political organization. [Br. 92].



Again—

The phase of Communist Party activities with which we are here concerned is the participation of its members in, and the incitement by its agents of, political strikes. [Br. 90].

This is, of course, nonsense. Section 9(h) does not penalize political strikes. It penalizes adherence to the Communist Party. That the distinction can and should be made between adherence to that party's political principles and participation in its "direct action" is perfectly clear from the Board's own argument. But when the Board asserts that Congress made that distinction in enacting 9(h) and struck only at the latter, it asserts the reverse of the truth. For what Congress did was just the opposite: it penalized adherence to the Communist Party or its beliefs, but did not deal at all with actual conduct.

The Board interweaves with the analysis described above the assertion that adherence to the political program of the Communist Party may be expected to lead to participation in its "direct action," and, therefore, that adherence to the political program can properly be the basis for hostile governmental discrimination:

But when the action which is to be anticipated from the holding of a certain belief is not constitutionally protected, constitutional guarantees are not infringed when that anticipation of action by those holding certain views is made the basis for legislative classification. [Br. 90-91].

This argument is adequately answered by the Board's own admission that adherence to the political principles of communism is constitutionally protected, and can and must be distinguished from participation in "direct action." It is the particular vice of 9(h) that it aims not at conduct but at political affiliation. That is just why it is clearly unconstitutional.

Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. [*Cantwell v. State of Connecticut*, 310 U. S. 296, 303-304.]

The Board also urges (p. 60) that Section 9(h) was intended,



*inter alia*, to expose the identity of union leaders who are communists, and that Congress has power to require the disclosure to employees of information which the latter may consider relevant in choosing their officers. But disclosure of the political and economic beliefs of union officers could be achieved simply by requiring them to state whether or not they are communists, or to what political party they adhere. Hence a statute whose primary objective is to force unions to remove communist officers, and which to that end penalizes unions for having such officers, is hardly to be sustained by treating it as if it merely required disclosure of political views.

### CONCLUSION

For the reasons stated, it is submitted that Section 9(h) should be held unconstitutional.

Respectfully submitted,

ARTHUR J. GOLDBERG  
*General Counsel*

FRANK DONNER

THOMAS E. HARRIS

*Assistant General Counsel*

February, 1949.

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IN THE

**Supreme Court of the United States**

October Term, 1949

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No. 13  
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**UNITED STEELWORKERS OF AMERICA, C. I. O., et. al.,**  
*Petitioners*

v.

**NATIONAL LABOR RELATIONS BOARD**  
\_\_\_\_\_

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**  
\_\_\_\_\_

**SUPPLEMENTAL STATEMENT FOR THE PETITIONERS**

**ARTHUR J. GOLDBERG  
THOMAS E. HARRIS**

*Counsel for Petitioners*

**IN THE**  
**Supreme Court of the United States**

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**SUPPLEMENTAL STATEMENT FOR THE PETITIONERS**

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This statement is submitted in order to call to the attention of the Court certain events which have occurred since petitioners filed their brief.

The petitioners here include both the United Steelworkers of America, CIO (the International Union), and its affiliated Local Unions Nos. 1010 and 64. The International Union has now filed the non-communist affidavits required by Section 9(h), while the local unions have not.

**I.**

As stated in our brief, the United Steelworkers of America, CIO, has always been able to comply with Section 9(h). Its officers are not Communists and have never been, and they have no sympathy with Communism. Indeed, the Union's Constitution bars Communists from holding office either in the International Union or a Local Union.

The Union nevertheless refused to file the affidavits because it considered that the statutory requirement was an unconstitutional restriction upon freedom of thought, speech and

assembly, and of political activity, which should therefore be resisted as a matter of principle.

However, as we pointed out in our brief, the National Labor Relations Act imposes exceedingly heavy penalties upon unions not complying with Section 9(h), including exclusion from the ballot in NLRB elections. Because of these penalties, the United Steelworkers of America, CIO, encountered increasing difficulty in maintaining its status as bargaining representative in certain plants which it had under contract, and its continued progressive growth was impaired.

Therefore the Executive Board of the International Union, on July 27, 1949, adopted the resolution which is attached hereto as Exhibit A. Paragraph 2 of that resolution reads:

2. In order to safeguard the interests of the membership of the Union and to go forward with the organization of the unorganized within our jurisdiction, the International Executive Board directs the international officers of this union and such officers of the various local unions of the United Steelworkers of America as may be designated by the international officers to file non-Communist affidavits required by Section 9(h) of the Taft-Hartley Act.

The resolution, while reiterating the opposition of the Union and its officers to Communism, likewise reiterates their continued "objection, in principle, to the Taft-Hartley requirement that the union officers file non-Communist affidavits." And the resolution directs the general counsel of the Union "to continue to prosecute test suits challenging the constitutionality of the illegal provisions" of the Taft-Hartley Act.

## II.

Pursuant to this resolution of the Executive Board, the international officers of the United Steelworkers of America have filed the non-communist affidavits required by Section 9(h).

The officers of the two local unions involved in this suit, Locals Nos. 1010 and 64, have, however, not filed the affidavits. The officers of the International Union have not directed them to file the affidavits, in view of the direction in the resolution

that this suit continue to be prosecuted, and the local union officers have not filed.

We wish to state, however, that whenever the necessities of the situation have so required, the officers of the International Union have directed the officers of local unions to comply with Section 9(h), and many of the local unions of the United Steelworkers of America are, therefore, now in compliance.

We wish further to state that the Inland Steel Company has never refused to bargain with the Union by reason of its non-compliance with 9(h), the present suit having arisen, rather, because of Inland's contention that pensions were not an issue on which an employer was required to bargain with a union. Since the denial of Inland's petition for certiorari (No. 435, October Term, 1948), by which it sought review of the question whether it must bargain on pensions, Inland has at least purported to bargain with the Union with regard to pensions. However no agreement has been reached.

### III.

However, the Inland Steel Company has not been under any legal compulsion to bargain with the Union, and still is not, even though the International Union has complied with 9(h), since the two local unions which admit to membership employees in the Inland plants involved in this case are not in compliance.

The Board's Order directed the Company to:

#### 1. Cease and desist from:

(a) Refusing to bargain collectively with Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO),<sup>\*</sup> with respect to its pension and retirement policies if and when said labor organization shall have complied within thirty (30) days from the date of this Order, with Section 9(f), (g), and (h) of the Act, as amended \* \* \*.

\* \* \*

#### 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

<sup>\*</sup> Hereinafter called "the Union." [Board's footnote.]



(a) Upon request and upon compliance by the Union with the filing requirements of the Act, as amended, in the manner set forth above, bargain collectively with respect to its pension and retirement policies with the Union as the exclusive representative of all its employees in the aforesaid appropriate unit;

And the Board holds, in such cases, that a union is not in compliance with Section 9(h), and cannot secure redress through the Board's processes, unless the international union and any local union "having members in the appropriate unit" have both complied. *Prudential Insurance Company of America*, 23 LRRM 1331.

The Order in this case is thus not enforceable against the Company, either at the behest of the International or the locals, unless and until the two locals, as well as the International, comply. This Court has held many times that voluntary discontinuance of an unfair labor practice does not bar or render moot a subsequent petition by the Board for enforcement of its order.

We, therefore, do not think that the present case is moot. However, we wished to make full disclosure to the Court of all circumstances which might be considered relevant to that question, and it is for that reason that this supplemental statement is filed.

Respectfully submitted,

—ARTHUR J. GOLDBERG

—General Counsel

THOMAS E. HARRIS

Assistant General Counsel

## APPENDIX A

The following resolution was adopted by the International Executive Board of the United Steelworkers of America, at a meeting held in New York City, July 27, 1949.

### Resolution

The United Steelworkers of America has always been and continues to be in the forefront of the fight for Taft-Hartley repeal.

We opposed this evil statute when it was first introduced into the Congress. From the day of its enactment by the reactionary coalition in the 80th Congress, we have struggled by all legitimate means to obtain its repeal.

In the election last November the people voted for Taft-Hartley repeal. They gave a mandate to the 81st Congress to wipe out this evil law and to restore the basic principles of the Wagner Act.

The 81st Congress has failed and refused to fulfill the people's will. The Senate, under Senator Taft's reactionary leadership, has passed a bill which reenacts the Taft-Hartley Act in all but name.

As President Murray has well stated in a recent message directed to all CIO affiliates, apparently we did not win the last election decisively enough. He called upon the CIO and its affiliated membership to engage in political action now so that the task can be completed of electing a Congress that will give effect to the will of the electorate.

The United Steelworker of America pledges its entire membership under President Murray's leadership to complete this undertaking. We shall never rest until the Taft-Hartley Act is completely eliminated and until the Wagner Act, with necessary improvements, becomes, once again, the law of the land.

The history of the last two years under Taft-Hartley Act has more than confirmed all of our fears expressed during the period when this ill-considered statute was being adopted in the Congress.

The Taft-Hartley Act has been used and is being used by unscrupulous employers as a device to destroy unions and to

prevent the organization of the unorganized. Under this evil law government by injunction has been restored and has been employed to an extent and degree heretofore unknown in the history of labor relations in this country. Unfair rules of liability have been imposed against trade unions. Legitimate union practices and procedures have been condemned and outlawed. Union security provisions of vital necessity for the protection of unions and their membership have been eliminated. Company unionism has been revived. The right to picket and to strike has been substantially curtailed. Freedoms essential to our democracy and to a free society have been abridged. The record of the workings of this malevolent law speaks for itself. Day by day its anti-union implications and applications become more apparent.

One of the features of the Taft-Hartley Act is a provision which specifies that even limited services of the Labor Board are available only to unions whose officers file non-Communist affidavits.

This section of the law further provides that non-filing unions are ineligible to petition for Labor Board elections.

It is unnecessary for this Executive Board of the United Steelworkers of America to record its unalterable opposition to Communism. The Constitution of our international union provides that no member shall be eligible for nomination or election or appointment to, or to hold any office, or position or to serve on any committee in the international union or the local union or to serve as delegate therefrom, who is a member, consistent supporter, or actively participates in the activities of the Communist Party or of any Fascist, Totalitarian, or other subversive organization which opposes the democratic principles to which our Nation and our Union are dedicated.

This union and its officers reiterate their opposition to Communism. We objected, and we continue to object, in principle, to the Taft-Hartley Act requirement that union officials file non-Communist affidavits because:

1. In the opinion of the union this is unconstitutional invasion of the political freedom of unions, union members, and union officials.

2. The provision is one-sided in its application to unions

and not to corporate officials, and does not encompass expressly fascist and other totalitarian and subversive organizations.

3. It is part of a viciously anti-union statute, and

4. It has no legitimate place in the Labor-Management Relations Act.

For these reasons the union and its officials have until now refused to comply with the Taft-Hartley non-Communist affidavit requirements.

The Union justifiably had reason to hope and believe that the 81st Congress would repeal this evil law in its entirety and re-enact a fair and equitable labor relations statute in its stead.

The failure of the 81st Congress to comply with the mandate of the last November election makes it apparent that the Taft-Hartley Act and all of its restrictive provisions, including non-Communist affidavit section, will remain on the statute books until a Congress more responsive to the people's will is elected.

The last Constitutional Convention of the United Steelworkers of America, held at Boston, in May of 1948, authorized this Executive Board to determine whether and when the union and its officers should file non-Communist affidavits under the statute.

This Executive Board, conscious of its obligations to the membership of the union, has carefully reviewed the present situation in light of the failure on the part of the 81st Congress to do its plain duty and to repeal the Taft-Hartley statute.

During the past two years, since the enactment of the Taft-Hartley Act, numerous anti-union employers in the steel and fabricating industry have taken advantage of the provisions of this law and the Labor Board's outlawry of non-complying unions to evade their statutory duties to bargain, to prevent this union from organizing their employees and to foist upon them weak and unmilitant craft unions or so-called independent unions which in truth and in fact are company unions.

The United Steelworkers of America is one of the pioneering industrial unions and is formally committed to the cause of industrial unionism. The history of its experience fully demonstrates the wisdom of the founders of the organization in creating this union on an industrial basis. Under the Taft-



Hartley Act the National Labor Relations Board has recently, in direct disregard of its own established precedents, directed elections in so-called craft units in various industries encompassed within the jurisdiction of our union. It has done so regardless of the degree of integration in the industry or the presence of any true craft groups and has excluded the United Steelworkers of America from the ballot of such elections by reason of our non-compliance status.

The activities of anti-union employers have reached such proportions that the continued progressive growth of the United Steelworkers of America is being challenged by the union's inability to use the facilities of the National Labor Relations Board in its present non-compliance status.

The United Steelworkers of America, as a loyal affiliate of the CIO, exists for the primary purpose of protecting its membership and organizing the unorganized and extending to them the benefits of union protection. Nothing can be permitted to thwart these lofty objectives, to which our union is dedicated.

Under these circumstances, the International Executive Board, in the interests of protecting the present membership of the union and to furthering the organization of the unorganized within its jurisdiction, at a special meeting convened in New York City on Wednesday, July 27, adopts the following resolution:

Now, therefore, be it resolved

1. The United Steelworkers of America directs its entire membership to the unfinished task of repealing the Taft-Hartley Act and restoring the Wagner Act with improvements designed to safeguard Labor's basic rights. We pledge the resources of this mighty organization and its one-million members to this objective.

2. In order to safeguard the interests of the membership of the Union and to go forward with the organization of the unorganized within our jurisdiction, the International Executive Board directs the international officers of this union and such officers of the various local unions of the United Steelworkers of America as may be designated by the international



officers to file non-Communist affidavits required by Section 9(h) of the Taft-Hartley Act.

3. In directing compliance the Executive Board of the United Steelworkers of America reiterates this organization's objection, in principle, to the Taft-Hartley requirement that the union officers file non-Communist affidavits. We direct the Political Action and Legislative Representatives of this union to continue to work for repeal of this and all other of the provisions of the Taft-Hartley Act. We further direct the general counsel of this union to continue to prosecute test suits challenging the constitutionality of the illegal provisions of this statute.

4. The International Executive Board further directs all district directors, staff representatives and local unions to utilize every legitimate means within their power to oppose the anti-union activities of employers and other groups and to bring into this union all unorganized workers within its chartered jurisdiction.

# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 431

UNITED STEELWORKERS OF AMERICA ET AL.,  
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board agrees that the questions presented in the Petition for a Writ of Certiorari, filed herein, raise substantial issues warranting review by this Court. If the Petition for a Writ of Certiorari is granted, the Board joins in petitioners' request that the case be assigned for argument together with *American Communications Association v. Douds*, No. 336, this Term, in which virtually identical issues are presented.

Respectfully submitted.

PHILIP B. PERLMAN,  
*Solicitor General.*

DECEMBER 1948

815388-48

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 431

UNITED STEELWORKERS OF AMERICA, ET AL.,  
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR  
RELATIONS BOARD

## OPINIONS BELOW

The opinion in the United States Court of Appeals for the Seventh Circuit (R. 82-116) is reported at 170 F. 2d 247. The decision and order of the National Labor Relations Board (R. 1-25) is reported at 77 N.L.R.B. No. 1.

## JURISDICTION

The decree of the court below was entered on October 28, 1948 (R. 118-120). The petition for a

writ of certiorari was filed on November 24, 1948, and granted on January 17, 1949 (R. 125). The jurisdiction of this Court rests on 28 U.S.C. 1254, and Sections 10 (e) and (f) of the National Labor Relations Act.

#### STATUTE INVOLVED

Sections 9 (f), (g) and (h) of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. Supp. I, 141, *et seq.*), are set forth at pages 138-140 of the Brief for Appellee in *American Communication Association v. Douds*, No. 336, this Term.

#### STATEMENT

On January 8, 1947, prior to amendment of the National Labor Relations Act, following the usual proceedings under Section 10 of the Act, the Trial Examiner issued an Intermediate Report in a case known upon the records of the Board as *In the Matter of Inland Steel Company and Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO)*, Case No. 13-C-2836 (R. 27-55). The Trial Examiner found that the company had violated Sections 8 (1) and (5) of the Act by refusing to bargain collectively with the Union concerning pension and retirement policies, and recommended that the Board order the company to cease and desist from its unfair labor practices (*ibid.*).

The amendments to the National Labor Relations Act, including Sections 9 (f), (g) and (h), became effective on August 22, 1947. Thereafter, on April 12, 1948, the Board issued its decision and



order in Case No. 13-C-2836 (R. 1-26). The Board, like the Trial Examiner, found that the company had violated Sections 8 (1) and (5) of the Act, and, to remedy the unfair labor practice, ordered the company to bargain collectively with the Union concerning its pension and retirement policies; to refrain from taking unilateral action with respect to these subjects; and to post appropriate notices. To effectuate the policy contained in Sections 9 (f), (g) and (h), however, the Board conditioned its order upon compliance by the Union with provisions of those Sections, within 30 days from April 12, 1948 (R. 20-22).

In thus conditioning its order upon compliance by the charging Union with the provisions of Sections 9 (f), (g) and (h), the Board followed the procedure established in *Matter of Marshall & Bruce Co.*, 75 N.L.R.B. 90. There the Board pointed out that the limitations upon the exercise of its powers which are contained in Sections 9 (f), (g) and (h) were intended to accomplish the objective of withholding the benefits of the Act from labor organizations which failed to comply with these provisions. The Board further noted that the statute expressly prohibits certification of a labor organization which has not complied. Since an order requiring an employer to bargain with a labor organization operates, in effect, "to place the Union in the position of a newly certified bargaining representative" (75 N.L.R.B. at p. 95), and "is often tantamount in practice to a certification"

(*ibid.* at p. 96), the Board believed that it would be inconsistent with the structure and incompatible with the policy of Sections 9 (f), (g) and (h), to enter such an order where the union involved, although accorded a reasonable opportunity to do so, failed or refused to comply. The Board stated (75 N.L.R.B. at p. 96):

We cannot believe that Congress intended the full force of Government to be brought to bear upon an employer to require him to bargain in the future with a Union which we now lack the authority to certify. Therefore, inasmuch as this Union has not complied with Section 9 (f), (g), and (h) and is not presently qualified for certification as bargaining representative, our remedial order in this proceeding shall in part be conditioned upon compliance by the Union with that Section of the amended Act, within 30 days from the date of the order herein

On May 14, 1948, the Union filed with the Board a document entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board," in which the Union requested the Board to amend its order by making it unconditional. In support of its request, the Union alleged that Section 9 (h) of the amended Act is unconstitutional, and that the Union had complied with the only valid conditions contained in the order, namely, those relating to Section 9 (f) and (g). (R. 56-60.)

On May 17, 1948, the Board issued an order denying the Union's request, and stating as follows (R. 62-63):

On May 14, 1948, the Union filed with the Board a document entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board." So far as here material, the Union alleges that it has complied with the requirements of Section 9 (f) and (g) of the Act as amended within the time limitation prescribed by the Board's Decision and Order and the Rules and Regulations of the Board, and that it has not complied with the requirements of Section 9 (h) of the Act as amended for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional, and void, in that, in specified respects they violate Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution. Asserting that it has thus complied with all the legal conditions prescribed in the Board's Decision and Order of May 12, 1948, the Union requests that the Board now make its said Order unconditional.

Upon due consideration of the matter, the Board believes that the Union's request for an amendment rendering the Board's Order unconditional must be, and it hereby is, denied. In the absence of authoritative judicial determination to the contrary, the Board assumes the constitutional validity of the provisions of the amended act.

On June 3, 1948, the Board denied motions filed by the Union on May 21, and by the Company on May 24, for enlargement of time for the Union's compliance with Section 9 (f), (g) and (h).

On April 30, 1948, Inland Steel Company filed in the court below a petition to review the Board's order insofar as it required the company to bargain with the Union (R. 64). On June 9, 1948, United Steel Workers of America filed a petition to review and set aside the condition contained in the order (R. 64). On September 23, 1948, the court below issued its decision holding that the Board's order requiring the company to bargain with the Union was valid and proper,<sup>1</sup> and further holding, Judge Major dissenting, that Section 9 (h) was constitutional and that the Board properly conditioned its order upon compliance by the Union with Section 9 (h) (R. 82-116). On October 28, 1948, the court below entered its decree enforcing the Board's order but modifying the condition contained therein by extending the time available for compliance by the Union with Section 9 (h) (R. 119), until "thirty (30) days from the date of this Decree, (or, in the event that the Union shall file a petition for a writ of certiorari in the Supreme Court of the United States within the time limited by law, then within thirty (30) days

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<sup>1</sup> This Court has pending before it a petition for certiorari seeking review of the decision below with respect to this issue, No. 435, this Term.

after the denial of such petition, or, if said petition be granted, within thirty (30) days after the issuance of the mandate of the Supreme Court of the United States in the proceedings upon said writ of certiorari)."

#### ARGUMENT

1. Apart from their contention that Section 9 (h) is unconstitutional and that the condition requiring compliance with that Section is therefore invalid, petitioners do not challenge the propriety of the Board's action in conditioning its order upon compliance by the Union with Sections 9 (f), (g) and (h). Indeed, the Union complied, within the time allotted by the Board, with the provisions of Sections 9 (f) and (g) (*supra*, p. 4). That the Board acted properly and within the scope of its discretion in conditioning its order upon compliance by the Union with Section 9 (f), (g) and (h), thereby effectuating the policy of those Sections, is, we think, beyond dispute.

As the Board noted in the *Marshall & Bruce* case, *supra*, an order requiring an employer to bargain with a union is, in practice, tantamount to a certification of the union as exclusive bargaining representative. Since the Board is precluded by the terms of the Act from certifying a union which fails or refuses to comply with the provisions of Sections 9 (f), (g) and (h), failure to condition the effectiveness of a bargaining order upon compliance would result in according prohibited status



to such organizations. The procedural limitations contained in Sections 9 (f), (g) and (h), as the Board also noted, *supra*, p. 3, embody a Congressional policy to induce labor organizations to comply with the requirements of those Sections by denying to non-complying unions the benefits resulting from access to Board facilities. If non-complying labor organizations were permitted to enjoy the benefits of a bargaining order obtained through Board facilities this policy would, *pro tanto*, fail of accomplishment.

The Board, of course, is charged with the obligation of so framing its orders as to effectuate the policies of the Act. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 192-193, 194, 200; *Southern Steamship Co. v. National Labor Relations Board*, 316 U. S. 31, 47; *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 18-19. Since its order to bargain looks to the future and governs a prospective relationship, the Board acted properly in conforming its order to the Congressional policy in effect at the time of its issuance. Cf. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 431-432; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 464; *American Steel Foundries v. Tri-City Council*, 257 U. S. 184, 208.

The courts, as well as the Board, have conditioned enforcement of bargaining orders issued before amendment of the Act upon compliance by the

union involved with Sections 9 (f), (g) and (h). In *National Labor Relations Board v. Brozen*, 166 F. 2d 812, 813-814 (C.A. 2), the Board, after amendment of the Act, sought enforcement of an order which had been issued prior to the effective date of the amendments, and which required the employer to bargain with a union which had not as yet complied with the filing and reporting provisions. In its opinion in that case the court said:

\*\*\* since enforcement by the court of the order to bargain looks to the future, the policy evidenced by section 9 (f), (g) and (h) precludes enforcement unless the union shall comply with the requirements of those sections. The Board concedes this to be true and requests the court to modify section 1 (a) and 2 (a) of the Board's order to provide that those provisions shall be effective only if the union shall comply with sections 9 (f), (g) and (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act within 30 days after entry of the court's order. Accordingly the order of the Board is so modified.

In *Times Mirror Company v. N.L.R.B.*, (C.A. 9), No. 10123, decided May 17, 1948, the court, over objection by the union involved, granted the Board's motion to dismiss without prejudice a petition to adjudge the employer in contempt of a bargaining order which had been entered prior to amendment of the Act, where the charging union

had failed to comply with the provisions of Section 9 (f), (g), and (h).

Since the Board properly conditioned its bargaining order upon compliance by the Union with Section 9 (h), its order is valid unless Section 9 (h) itself is unconstitutional. Cf. *National Maritime Union v. Herzog*, 334 U. S. 854.

2. The posture of this case demonstrates even more clearly the point made in the Government's brief in *American Communications Association v. Douds*, No. 336, pp. 64-79, that Section 9 (h) does not deprive any labor organization, or officer thereof, of any pre-existing private right. For the sole consequence of the application of Section 9 (h) in this case is that petitioner is denied the benefit which it would derive from enforcement of the Board's order requiring the company to bargain concerning pension plans. On no theory do petitioners have a private right to the benefits of such an order. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 265; *Jacobsen v. National Labor Relations Board*, 120 F. 2d 96, 99-100 (C.A. 3). Moreover, absent such an order, the union remains free to strike to compel the company to bargain with it concerning pensions, as well as all other issues appropriate to collective bargaining.

3. Petitioners call attention, at the outset of their brief, to the fact that Article III, Section 4, of the Constitution of the United Steelworkers of America, CIO, bars from eligibility to any union office,

anyone "who is a member, consistent supporter, or who actively participates in the activities of the Communist Party" (Br. p. 7), and assert that "Mr. Murray and other influential leaders of the CIO [are] effectively combatting communist influences in unions" (p. 7-8). Petitioners, however, do not suggest that by this provision and in these activities Mr. Murray and the CIO are engaged in a campaign to suppress political unorthodoxy or to stifle effective expression of political views which they find unacceptable. In the light of Mr. Murray's statements quoted on pp. 41-42 of our brief in No. 336, concerning the potentially devastating effect of Communist leadership upon the legitimate activities of the American trade-union movement, and upon the unions themselves, petitioner would undoubtedly resent any suggestion that bigotry or intolerance explain the Union's exclusion of Communists from office. Yet, petitioners, while recognizing for their own purposes the intimate relation between affiliation with the Communist Party and abuse of the powers of union office, persist in denying the existence of this relationship when they discuss the basis for the Congressional action which they here attack (Br. 26). Thus, petitioners assert, "the statute strikes directly at the freedom of belief, speech, and political activity of union officers. And persons who have exercised these constitutionally protected freedoms in a fashion unacceptable to Congress are, in consequence of their unorthodoxy, denied yet another right essential to the



expression and effectuation of their beliefs—the right, if the membership agrees, to be an officer of a labor union. Thus they are excluded from the very positions in which they might give effective expression to their views—and that, of course, is why they are excluded.”

The effect of Section 9 (h) upon persons who desire to hold union office is, even on petitioners’ theory, no greater than the effect of the union’s own rule. If that rule does not “strike directly at the freedoms of belief, speech, and political activity of union officers,” neither does Section 9 (h). And unless petitioners are willing to assert that Communists are denied office in the United Steelworkers Union only because, as officers, “they might give effective expression to their views,” views which the union disapproves merely because of their “un-orthodoxy,” it comes with poor grace from petitioners to attribute such motives to Congress. We submit that the Union’s own action in excluding Communists from office for legitimate trade union reasons reduces to polemics its charge (Br. 34), that Congress adopted Section 9 (h) “simply because it wanted to weaken the power of adherents of a party which it detested and distrusted.”

Finally, petitioners’ exclusion of members and adherents of the Communist Party from office in the Union refutes their argument that Congress could rationally deal with the evils inherent in the leadership of trade unions by Communists only by legislating against specific evil practices of union



leaders. What the Union did to cope with the threat to its existence speaks more loudly than what it now says. Congress, in acting to protect national interests against the very same dangers, is not restricted to less effective means.

For the reasons set forth in our brief in the *American Communications Association* case, we believe that ample basis exists for denying to labor organizations whose officers fail or refuse to file the affidavits contemplated by Section 9 (h) the benefits of Board orders such as that here involved. The judgment below should, therefore, be affirmed.

Respectfully submitted,

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CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1948

No. 431 **13**

UNITED STEEL WORKERS OF AMERICA, et al.,

*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD.

No. **10**

AMERICAN COMMUNICATIONS ASSOCIATION, et al.,

*Petitioners,*

v.

CHARLES T. DOUGS, et al.

**10**

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IN THE  
**Supreme Court of the United States**

October Term, 1948.

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No. 431.

UNITED STEEL WORKERS OF AMERICA, ET AL., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD.

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No. 336.

AMERICAN COMMUNICATIONS ASSOCIATION, ET AL., *Petitioners,*

v.

CHARLES T. DOUDS, ET AL.

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**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS  
CURIAE AFTER ARGUMENT AND BRIEF.**

Now comes United Electrical Radio & Machine Workers of America (UEA), C.I.O., by their attorney, and respectfully moves the Court for leave to file the annexed brief after argument as amicus curiae in support of the petitioners in the above entitled actions.

In support thereof, movant respectfully shows that the written consent of the petitioners' and respondents' counsel

to the filing of a brief amicus curiae by movant has been filed with the Clerk; that movant was notified of the date of argument by petitioners too late for movant to file its brief before argument; and that movant has moved diligently to file its brief as soon as possible after argument.

Respectfully submitted,

ALLAN R. ROSENBERG,  
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IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1948**

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**No. 431**

UNITED STEEL WORKERS OF AMERICA, et al.,  
*Petitioners,*  
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**No. 336**

AMERICAN COMMUNICATIONS ASSOCIATION, et al.,  
*Petitioners,*  
v.

CHARLES T. DOUDS, et al.

---

**MOTION FOR LEAVE TO FILE BRIEF  
AS AMICUS CURIAE AND BRIEF**

United Electrical, Radio & Machine Workers of America (UE), CIO, respectfully moves this Court for leave to file a brief amicus curiae in support of the petitioners in the above entitled actions. The written consent of petitioners' and respondents' counsel to this motion has been filed with the Clerk.

## Statement of Interest

The United Electrical, Radio & Machine Workers of America (UE), CIO, is a national trade union representing over 600,000 working men and women in the electrical, radio and machine industries of this country and Canada. The UE was organized by representatives of working men and women in 1936. It is an organization which as the preamble to its constitution and by-laws states, "unites all workers in our industry on an industrial basis, and rank and file control, regardless of craft, age, sex, nationality, race, creed or political beliefs." At its founding convention, the delegates assembled pledged themselves "to labor unitedly for the principles herein set forth, perpetuate our union and work concertedly with other labor organizations to bring about a higher standard of living of the workers".

The UE from its very inception has been built upon the solid rock of democratic trade unionism. It has endeavored in its every action to shape its fundamental law and its daily conduct in the light of the basic principles of American democracy. Membership in the UE by constitutional provision is open to all men and women whose normal occupation is in the electrical, radio and machine industries, and as the constitution states, "this membership is available regardless of skill, age, sex, nationality, color, religious or political belief or affiliation". This insistence upon thoroughgoing democracy as a way of life for a trade union has been over the years grounded not only in a deep belief in the validity of American traditions, but also in the firm realization that trade unionism itself can survive only in this framework. As the General Officers of the UE stated to the Congress of the United States prior to the passage of the Taft-Hartley Act:

"The maintenance by our membership of the equal rights of every member, 'regardless of craft, age, sex, nationality, race, creed or political beliefs' does not

constitute adherence by the organization or of any individual member to any particular political philosophy, any more than it implies adherence to any particular creed, or membership in any race or sex.

"But it does most strongly affirm the right, not only of the individual member to hold any office or position in the Union for which he may be chosen by his fellow-members, but also the right of all members, collectively, to elect any member they may choose to any office or post in the UE.

"This is the strongest possible insurance that the membership will continue to control this Union, and that no group, political, religious, fraternal, national, or any other, will ever be able to dominate the Union."

# I

## **Section 9h of the National Labor Relations Act, as amended, violates the Constitution.**

In their petition for the writ of certiorari the United Steelworkers attacked the constitutionality of Section 9h of the National Labor Relations Act, as amended, for the following reasons:

(1) Because it deprives unions, union officers, and members of unions, of freedom of thought, speech, and assembly, in violation of the First Amendment of the United States Constitution.

(2) Because it is not narrowly drawn to meet the evil purportedly aimed at, while invading as little as possible the guarantees of the First Amendment, but invades basic rights whose impairment is unnecessary to the provision's claimed purpose, in violation of the First and Fifth Amendments.

(3) Because it is vague and indefinite, and imposes tests of guilt by association, all in violation of the First and Fifth Amendments.

(4) Because it constitutes a bill of attainder, within the meaning of Article I, Section 9, Clause 3 of the Constitution.

The UE fully associates itself with this statement of the petitioners, United Steelworkers of America.

This Court has many times reaffirmed the fundamental importance of trade unions to the country. *Jones & Laughlin Steel Co. v. NLRB*, 301 U. S. 1; *American Steel Foundries v. Tri-City Central Council*, 257 U. S. 184. The right to organize into trade unions and bargain collectively with their employers has been recognized by this Court as the most essential method through which working people exercise the rights of economic, social and political democracy guaranteed to them in the Constitution itself. *Thomas v. Collins*, 323 U. S. 516, 544 (concurring opinion of Mr. Justice Jackson); *Thornhill v. Alabama*, 310 U. S. 88. A trade union is more than another organization. Without a trade union a worker is unable to gain for himself even the most elementary standard of subsistence. American history has demonstrated, as this Court has pointed out, that trade unions are the instruments through which American workers have been able to resist the ravages of organized industrial monopolies. Chief Justice Taft, more than twenty-five years ago, stated for this Court that unions are "essential" to working men; that they are born out of the "necessities" of economic life. *American Steel Foundries v. Tri-City Central Council*, 257 U. S. 184. The trade union has become for the American worker not only a bulwark of strength against economic oppression, but a vehicle for exercising his political rights of free press, speech and assembly. Through his trade union the American worker takes part in the political processes of democracy. Indeed, without vigorous and free trade unions, it is doubtful whether American democracy itself could survive. This Court itself has recognized in recent years that the very nature of a trade union requires that the concept of full democracy runs through every aspect of

trade union activities. *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192. Any device, legislative or judicial, which threatens to emasculate and destroy the complete democratic life of a trade union, strikes therefore not at the trade union alone but the entire country. This country will depend for its future peace and security, for the happiness of its entire people, to a very great extent upon the functioning of free democratic trade unions. This Court, therefore, is under a profound obligation to reject any attempt to undermine the democratic control of a trade union by its own membership.

There is no more inflexible principle of American democracy than that the Government may not dictate to any citizen concerning his religious, economic, social or political beliefs or affiliation. This Court has reaffirmed this first principle in most vigorous language. This is the principle upon which all other precepts of democratic government are based. It is the cornerstone upon which the entire structure of constitutional democracy is erected.

This country has just emerged from a war in which hundreds of thousands of Americans were killed or maimed, a war fought against those forces of German and Japanese fascism who sought to impose their system of thought control on the entire world. It is too late indeed for anyone, whether or not in high legislative office, to challenge in this Court the meaning of this underriding concept of the Constitution.

Those who fashioned this constitutional democracy were concerned with providing for the fullest possible opportunity for popular control over the destinies of the country. They were concerned lest the Government falling into the hands of powerful selfish interests could perpetuate itself while adopting measures destructive of the public interest by closing off the normal channels of democratic participation and control over the Government. A government under the influence of powerful, wealthy corporate interests could perpetuate its control over the entire life of the nation by declaring heretical unorthodox opinions



and beliefs, and those who oppose their rule. This was precisely the situation which the Constitution was designed to prevent. As long as the right of every American to determine for himself the truth or falsity of religious, economic, social and political ideas remains unimpaired by governmental restriction, so long will the corrective processes of political democracy remain open. Once a concession is made, once a wedge is driven into this constitutional bedrock, the entire structure of democratic government begins to totter.

This Court has said, "no higher duty, no more solemn responsibility rests upon this Court than that of translating to living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our constitution—of whatever race, creed, or persuasion." *Chambers v. Florida*, 309 U. S. 227.

The Government may not dictate to trade unions as to the political beliefs or affiliation of its members or officers for the very reason that the Government may not so dictate to any American citizen. The very reason which requires the adoption of the First Amendment and the Bill of Rights requires the rejection of any such governmental dictation.

If a trade union is the channel through which working people utilize the processes of popular government to shape the destiny of modern industrial society (*Thornhill v. Alabama*, 310 U. S. at 103) trade union members may not be restricted in any way by Government or employers in the selection of their representatives. A restraint upon this free selection is prohibited by the Constitution for the very same reason which forbids restraints upon any channel of democratic expression. Such a restraint interferes with the very procedure through which democracy functions. *United States v. Caroline Products*, 303 U. S. 144.

American democracy requires for its vitality a free trade union movement. Any attempt to substitute govern-

mental dictation for free, unrestricted membership control of a trade union is therefore not merely an attack upon the constitutional rights of trade union members. It is a threat to the entire framework of American democracy.

Respectfully submitted,

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WORKERS OF AMERICA, CIO.

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**Supreme Court of the United States**

**OCTOBER TERM, 1949**

No. 10

**AMERICAN COMMUNICATIONS ASSOCIATION, C. I. O., et al.**

**v.**

**CHARLES T. DOUDS, Individually and as Regional Director  
of the National Labor Relations Board, Second Region.**

**APPELLANTS' PETITION FOR REHEARING**

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# Supreme Court of the United States

OCTOBER TERM, 1949

No. 10

AMERICAN COMMUNICATIONS ASSOCIATION, C. I. O., et al.

v.

CHARLES T. DOUDS, Individually and as Regional Director  
of the National Labor Relations Board, Second Region.

## APPELLANTS' PETITION FOR REHEARING

Appellants respectfully request that this Court reconsider its decision filed herein on the 8th day of May, 1950, and grant appellants a rehearing in this case, pursuant to Rule 33, on the grounds hereinafter set forth.

### Issue Involved and Background

This case calls into issue the constitutionality of Section 9(h) of the Labor Management Relations Act (61 Stat. 136, 146, 29 U. S. C. Supp., Sections 154, 159(h)). By virtue of that section, a union may not use the facilities of the National Labor Relations Board, may not enter into a union shop contract, and, in some circumstances, loses the right to strike, unless each of its officers shall execute an oath attesting that "he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any

illegal or unconstitutional methods". The law further provides that Section 35(a) of the Criminal Code shall be applicable in all respects to such affidavits.

The officers of the plaintiff union had refused to sign the affidavit in the terms set forth above and, accordingly, the plaintiff union and its members were denied the right to avail themselves of the Board's facilities. The union was refused the right to a place on the ballot in an election conducted by the Board among employees who desired to be represented by it and for whom the union had previously been the sole collective bargaining representative. The employees, rather than have no union represent them, voted for a rival union which was the only union appearing on the ballot, and that union was thereupon certified as the sole collective bargaining representative of the employees in place and stead of the plaintiff union. Accordingly, the plaintiff union was further denied the right to strike (Section 8(b)(4)(C) of the Act).

With the repetition of such incidents it becomes evident that the operation of Section 9(h) makes it, at best, extremely difficult for unions to survive if their officers fail or refuse to sign the affidavit. Irresistible pressure is thereby exerted upon such unions to remove such officers, who must constitute a burden to them by virtue of the application of the Act.

As posed by this Court, "[t]he difficult question that emerges is whether consistently with the First Amendment, Congress, by statute, may exert these pressures upon labor unions to deny positions of leadership to certain persons who are identified by particular associations and political affiliations" (p. 6, Vinson, J.).

The question posed is not only difficult but, as this Court recognized, presents constitutional issues of "manifest importance". It is submitted that an issue of such serious proportions is entitled to the fullest possible consideration.

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\* All references are to slip sheet opinions.

The case was argued before only six members of the Court. Mr. Justice Clark had of necessity disqualified himself because the Department of Justice had participated in the proceedings while he was Attorney General. Mr. Justice Minton had not been sworn in as a Justice of this Court at the time of the argument and presumably he would not have participated in any event, in view of the fact that he had decided, in the lower court, the companion case of *United Steel Workers of America v. N. L. R. B.* Mr. Justice Douglas was unable to participate in view of illness which had necessitated his absence from the bench, but would be available on a rehearing.

Thus, the case was heard by only two-thirds of the Court. Further, despite the limited number of Judges participating, the case resulted in four separate opinions representing as many divergent views on the constitutionality of the statute as framed. Finally, we find that this statute was upheld by an evenly divided Court, since only three of the Justices participating held that it was constitutional in its entirety. Obviously, it is advisable that in considering a case of this importance, as many members of the Court participate as is possible.

The principal issue causing difference among the Justices of the Court arose out of the provisions of the statute which effected the specified disabilities upon mere beliefs or opinions "even though [those beliefs or opinions] may never have matured into any overt act whatever, or even been given utterance" (p. 15, Jackson, J.).

Chief Justice Vinson, with whom Justices Reed and Burton concurred, agreed that if the belief provisions of the statute "were read very literally to include all persons who might, under any conceivable circumstances, subscribe to that belief" (p. 23), the breadth of the statute would raise serious constitutional problems. To get around this difficulty they have added limiting language so as to make the statute apply to persons and organizations who believe in violent overthrow of the Government "as it presently

exists under the Constitution as an objective, not merely a prophecy". It is submitted not only that no such interpretation may be drawn by virtue of the statute itself, but that no authority appears in the legislative history of the statute which might indicate such an intent on the part of Congress.

It is respectfully submitted that it is not the function of this Court to alter the language of a statute in order to "force" it into constitutionality. Thus, Mr. Justice Frankfurter, who is well known to have consistently made every rational effort to favor the constitutionality of legislative enactments, indicated that he, too, could sustain the validity of the statute by eliminating certain portions thereof and rewriting others. However, he made clear that by virtue of the language of this statute and its background such a course was impossible because "what Congress has written does not permit such a gloss nor deletion of what it has written" (p. 7). Mr. Justice Jackson, in discussing the limitations read into the statute by the prevailing opinion, asserted that the limitations thus effected did not render it constitutional but merely rendered it so vague as to compound the invalidity of the statute. Mr. Justice Black likewise agreed that the belief provision of the law exceeded the permissible area of congressional action by virtue of the provisions of the First Amendment to the Constitution and, indeed, our entire historical background and way of life.

For, as pointed out by the dissenting Justices, belief is not a proper subject for legislative action. Thus, Mr. Justice Jackson stressed that, "While the Governments, State and Federal, have expansive powers to curtail action, and some small powers to curtail speech or writing, I think neither has any power, on any pretext, directly or indirectly to attempt foreclosure of any line of thought. Our forefathers found the evils of free thinking more to be endured than the evils of inquest or suppression. They gave the status of almost absolute individual rights to the outward means of expressing belief. I cannot be-



lieve that they left open a way for legislation to embarrass or impede the mere intellectual processes by which those expressions of belief are examined and formulated. This is not only because individual thinking presents no danger to society, but because thoughtful, bold and independent minds are essential to wise and considered self-government" (p. 21).

Indeed, this abhorrence of "thought control" is not new. Not only was it completely and absolutely rejected by those who founded this country and its Constitution, but, prior to this decision, by our courts as well. To step back now and to permit any civil disability based upon mere thought, absent any overt act (which is what the decision of the Court here effects), not only discards that which this Court has heretofore adhered to as within the command of our Constitution, but indeed, flies in the face of its previous warnings.

*Cantwell v. Connecticut*, 310 U. S. 296;

*Jones v. Opelika*, 319 U. S. 103;

*Minersville v. Gobitis* dissent, 310 U. S. 586;

*West Virginia v. Barnette*, 319 U. S. 624;

*Stromberg v. California*, 283 U. S. 359;

*Bridges v. California*, 318 U. S. 252;

*Thomas v. Collins*, 323 U. S. 516.

The decision of the Court seeks to justify this interference with the heretofore inviolate right of belief by arguing that the holding of the particular belief is not "punished" or "forbidden" by the statute. It urges that one merely loses his position thereby, and that loss of a particular position is neither loss of life nor liberty (it does not mention property), the distinction being one of degree. Further, the Court points out that Section 9(h) touches only a relative handful of persons, leaving the great majority of those of the identified affiliations and beliefs completely free from restraint.



But this Court has long held that loss of the right to pursue one's vocation is punishment and, indeed, loss of liberty as well as property.

*Allgeyer v. State of Louisiana*, 164 U. S. 578;

*Meyer v. N. L. R. B.*, 262 U. S. 390;

*United States v. Lovett*, 328 U. S. 303.

Indeed, such punishment to the individual holding the belief is so great that the alternative facing him must be "between the rock and the whirlpool", as the earlier reasoning of the decision makes clear. He must either give up his chosen vocation or forswear his belief. It is to quibble to argue that the belief is not thereby punished or forbidden.

Also, the fact that the harm or interference may possibly be considered less in degree than direct punishment or prohibition of the belief, or that it affects only a "handful" of people is hardly availing to make the interference permissible under our Constitution. The decisions of this Court in the past have spoken unequivocally on this subject. There shall be no interference. Freedom of belief is inviolate. Our courts have heretofore stressed that the protection of the Constitution is afforded to *all*. For only in that way can democracy be guaranteed. It is precisely in this fundamental regard that we differ from other nations and therein lies the security of our nation".

As so aptly stated by the late Justice Rutledge in *Thomas v. Collins*, 323 U. S. 516, page 530:

"The restraint is not small when it is considered what was restrained. The right is a national right federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth which no state, nor all together, nor the nation itself can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow.

This fact can be no more plain than when they are imposed on the basic rights of all. Seedlings planted in that soil grow great, and growing, break down foundations of liberty."

Nor is it accurate to state that only a "handful" are affected by this restriction on belief. Not only the individual officers are so affected but also the entire membership of the union which desires to be represented by those officers and to enter into certain contracts and engage in certain strikes.

Thus the Court was faced with a statute which raises questions of serious and basic importance. Only three Justices have concurred in a decision which has the effect of upholding this statute. This decision is at variance with the express language of the Constitution and a host of authorities on the question of belief. Even these three Justices arrive at their conclusion by refusing to read "very literally" the language of the statute—conceding that otherwise its breadth is beyond what is constitutionally permissible. We submit that under such circumstances, bearing in mind the serious nature of the issues involved and their tremendous importance, the decision of the Court herein should be reconsidered and a rehearing granted.

## II

The vagueness and potential scope of the oath which the Court has validated is far beyond that heretofore deemed permissible under the due process clause of the Constitution. We submit that Mr. Justice Frankfurter has correctly termed portions of the section as an indiscriminate net bringing within its sweep the surrender of freedoms so undefined as not fairly to disclose what is proscribed. We fully concur that those portions of the section thus criticized are constitutionally defective for the reasons stated.

However, we must go further. For we are at a loss to see how any affiant might with any fair degree of

accuracy determine what is "an organization that is in fact a controlled cover for that Party" (p. 7, Frankfurter, J.). Mr. Justice Jackson in a footnote has recognized and deplored the current pernicious idea that every radical measure is "Communist" or every liberal-minded person a "Communist" (p. 18). Indeed, the Attorney General has formulated a list of over seventy-five organizations which he deems "subversive". Is the affiant to consider his membership in any of those organizations as within the proscribed area? Are they to be considered "covers" for the Communist Party? Are they "affiliated" therewith? The Court, in *Bridges v. Wixon*, 326 U. S. 135, as pointed out in our original brief, had a great deal of difficulty with that term and we submit that we too are faced with that difficulty as lawyers in trying to advise our clients. The position of an affiant in reaching the proper solution is obviously still more difficult and hazardous.

Must a person, to be certain in his oath, sever any connection with any of those organizations even though some are primarily insurance groups and others are groups interested in but a very narrow sphere of our political life? And must a leader avoid any connection with the innumerable other organizations on which indiscriminate labels of "Communist" have been placed upon risk that a jury might find that he wilfully committed perjury?

Such proscriptions must run into sharp conflict with the First and Fifth Amendments. It is most certainly true that such statutes as were stricken by this Court in *Musser v. Utah*, 333 U. S. 95, and *Winters v. New York*, 333 U. S. 507, "appear trivial by comparison with what is here involved" (p. 6, Frankfurter, J.).

▲ We ask the Court to reconsider its ruling in this regard, particularly in view of its previous holdings that statutes which touch on First Amendment rights must be fastidiously drawn and must define the conduct proscribed specifically "so that the person or persons affected remain secure and unrestrained in their rights to engage in activi-

ties not encompassed by the legislation". *United States v. C. I. O.*, 335 U. S. 106.

See also:

*Winters v. New York*, 333 U. S. 507;

*Small Co. v. American Sugar Refining Co.*, 267 U. S. 233;

*Connolly v. General Construction Co.*, 269 U. S. 385.

### III

It must further be realized that although two of the Justices talk of severing certain portions of Section 9(h), the plaintiffs here were given the option only of signing an affidavit in the precise words of the statute (including both those pertaining to belief and affiliation) or of suffering the disabilities consequent on not signing at all. Therefore, even were it possible to sever the provisions of 9(h) and to preserve a section thereof as constitutional, the judgment of the Court below would need be reversed.

Moreover, it is submitted that Section 9(h) is incapable of being severed. It should be noted first that there was no agreement as to the portions which might be severed. Mr. Justice Frankfurter felt that only the portion of the oath which referred to membership in the Communist Party was valid. Mr. Justice Jackson expressly declined to define his views on this subject, as such definition was not necessary to a decision.

But this is not the sole difficulty to be encountered. For a law may be severed only where the deletion of the invalid portions leaves the balance complete and unchanged in meaning. However, this may not be done where the clause excised intimately inheres in the scheme of the law within which it is incorporated. For where the vice of a provision runs through the whole of it, courts may not, by lopping and paring away, create a new law which the structure and context of the statute shows the Legislature did not



intend to enact. *Watson v. Buck*, 313 U. S. 387; *United States v. Shoreline Cooperative Apts.*, 70 S. C. 246; *Reit v. Mealey*, 313 U. S. 542. Further, a separability clause in a statute, while giving rise to a presumption of divisibility, is not an inexorable command. It does not permit a Court to so rewrite the statute as to give it an effect altogether different from that intended by Congress. *Railroad Retirement Board v. Alton*, 295 U. S. 330.

It seems clear that Congress never considered Section 9(h) as comprising a series of separable provisions such as would permit of severance, but rather that it was contemplated as an entirety. Thus, to delete any clause thereof would alter the intent and aim of Congress in enacting it. There was no debate in Congress as to whether certain portions of the section ought to be added or eliminated. Debate was limited rather between those who felt the entire section unconstitutional in its purpose and effect and those who favored it in its entirety. The sole discussion as to any particular clause was with reference to whether the section should include an "or ever has been" clause (see original brief, pp. 86-88). It seems clear therefore, that Congress never intended the section to be severable, and hence under the authorities any severance thereof would be improper.

#### IV

The departure of the Court from its previous decision is possibly most sharply demonstrated by its rejection of the doctrine that "guilt is personal". Whether it be called an "epithet" or a "slogan", we submit that such doctrine similar to the doctrine that "a man is innocent until proven guilty", or indeed that "each man is entitled to his day in court", goes to the very root of our democracy. True as Mr. Justice Jackson points out, a man may be guilty by his participation in a conspiracy, but certainly under our form of government it is not for Congress to charge



and find such a conspiracy. That is the function of our courts.

It is a further function of our courts, and a most critical one, to reject any attempt by Congress to find anyone or any clearly ascertainable group guilty of an illegal conspiracy and to punish them therefor.\* Yet this is the fundamental premise which has been discarded by the Court's decision herein.

We realize, as the Court itself indicated, that these are emotional times and that all must be influenced somewhat thereby. However, it is submitted that while all others may yield and give way, it is incumbent upon this Court to resist the passions of the time, to maintain judicial calm, and to abide by the strict legal reasoning which it evolved in more peaceful times against this later need. For our way of life and its safeguards have proven adequate to any situation which has faced this country and it is only by further strict adherence to them that we can avoid the errors and dismal failures of other countries.

The Communist Party is not a new organization. Its methods of operation are not noticeably different from those utilized by it seven years ago when this Court rendered its decision in *United States v. Schneiderman*, 320 U. S. 118. If the alleged principles of the Communist Party could not then constitutionally be imputed to all of its members, we submit they cannot be so now. For our Constitution has not changed as to this fundamental principle. Further, it should be noted that in the *Schneiderman* case the views of the Communist Party were the subject

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\* In fact, any legislation which effects punishment as a result of a finding by Congress of an illegal conspiracy constitutes a bill of attainder. Mr. Justice Jackson, in his decision, apparently agrees that Congress, in enacting 9(h), has made just such a finding of conspiracy. It seems clear, therefore, that as argued in our original brief, 9(h) must constitute a bill of attainder. We submit that the prevailing opinion is in error in holding that a bill of attainder refers to punishment for only past acts. See *United States v. Lovett*, 328 U. S. 303. That requirement is one inherent in only ex-post-facto legislation. See discussion, original brief, pp. 83-92.

of a judicial trial. Here, we have only a determination by Congress, based on evidence most of which would be of doubtful admissibility or credibility in a judicial proceeding, as Mr. Justice Jackson notes.

There is no doubt that the views and philosophy of the Communist Party are in many quarters today unpopular, and that the members of this Court may disagree with those views most violently. But, as stated by Mr. Justice Holmes in his decision in *United States v. Schwimmer*, 279 U. S. 644, 654, 655:

"If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate."

Absent incitement, this principle holds equally true for freedom of speech.

As Mr. Justice Black points out, "Laws aimed at one political or religious group, however rational in their beginnings, generate hatred and prejudices which rapidly spread beyond control" (p. 4). It is hardly an answer to state, as the prevailing opinion indicates, that we will not retreat one step more "while this Court sits". For the Court has in this very decision gone much further than anyone had a right to expect by virtue of its previous decisions. We have here seen an attack on freedom of belief and on the doctrine that guilt is personal. The principle that legislation must be carefully drawn so that one might safely know from what conduct he is proscribed has apparently been rejected. The basic premise that guilt in an illegal conspiracy is one which may be only judicially determined has been clearly discarded and the heretofore equally clear premise that legislation must deal only with abuses, leaving the freedoms of speech and press guaranteed by our Constitution unimpaired save in the instance of a "clear and present danger" has been cast in doubt.

Moreover, unless Judges are to be guilty of that very naivete against which Mr. Justice Frankfurter protests, this Court must realize that by refusing to hold fast to the doctrines previously enunciated by it, it is giving impetus to the current trend against free thought which must have serious repercussions throughout the land. The indiscriminate pinning of labels upon persons who evidence any liberal sentiment, the loss of rights and positions on the mere charge of unorthodox beliefs and affiliation, are unfortunately rampant today and in fact have received, in part, governmental sanction. Teachers in various States have already been obligated to take an oath similar to the one prescribed here.\* All public employees in the State of Maryland, excluding laborers, likewise are required to take such an oath.†

Nor does this affect merely government employees. The Coast Guard has but recently held that no one may be employed as a radio operator on any privately-owned merchant ship if he is affiliated with or "sympathetic" to the principles of any "disloyal" or "subversive" organization, including any organization appearing on the Attorney General's list. A District Court in the District of Columbia has sustained this administrative ruling on the basis of an argument by the Government that such action was found legal and proper in the decision of the lower Court in the instant case upholding the validity of Section 9(h).‡

Literally hundreds of persons have been called before Congressional Committees and questioned as to their belief and affiliations. Those who refused to answer have been held for contempt. Others who deny irresponsible and unus-

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\* Subversive Activities Act, also known as the "Feinberg Law", Chapter 360 of the Laws of 1949 of New York.

† Sedition & Subversive Activities Act, also known as the "Oler Bill", Chapter 86 of the Acts of the General Assembly of 1949, Maryland.

‡ *Gove v. Farley*, Civil No. 4596-49, presently pending in the Court of Appeals, District of Columbia.

tained charges against them have been subjected to perjury trials. Still others, on the basis of such unfounded public charges which they have been given no opportunity to answer, have lost their employment, even in private industry, and have been subjected to public disgrace.

Many injured persons will never get an opportunity to have their wrongs adjudicated by this Court. Others must wait years. Meanwhile they must suffer irreparable injury of a type which our Constitution was designed to prevent. To rule, therefore, that but a limited number were affected by the statute in question is to ignore this vast and expanding attack on the principle of free thought and speech of which this statute represents but a small and integral part. It is only by a reaffirmation of those basic principles at this time that this tide might be stemmed.

## CONCLUSION

We should like to note in conclusion that this petition for rehearing highlights only some of the aspects of the unconstitutionality of Section 9(h). We believe, as originally argued by us, that the evils of 9(h) permeate its entirety and that the statute is based on a concept completely alien to our Government and its Constitution. We submit that the forthright and penetrating opinion of Mr. Justice Black ably sets forth the invalidity of the statute, and with that opinion we fully concur.

Respectfully submitted,

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American Communications  
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of Counsel.

**Certificate of Counsel**

I, VICTOR RABINOWITZ, do hereby certify that I am attorney for the appellants herein, and that this petition for rehearing is presented in good faith and not for delay.

May 23, 1950.

VICTOR RABINOWITZ.



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IN THE  
**Supreme Court of the United States**

October Term, 1949

No. 13

**UNITED STEELWORKERS OF AMERICA, CIO et al**  
*Petitioners*  
v.

**NATIONAL LABOR RELATIONS BOARD**

**On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit**

**PETITION FOR REHEARING**

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**IN THE**  
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**v.**

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**On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit**

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**PETITION FOR REHEARING**

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United Steelworkers of America, CIO, et al, petitioners in the above entitled cause, hereby petition for rehearing.

**GROUND'S UPON WHICH REHEARING IS ASKED**

The grounds which petitioners request a rehearing is that the Court's affirmance of the lower Court's judgment was by an equally divided court; and that, so far as petitioners are aware, an additional justice would be available to participate in the decision of the case upon rehearing.

The issue ruled upon by the Court in this case is the constitutionality of Section 9(h) of the National Labor Relations Act, as amended. That section provides for the execution, by each officer of a labor organization, of an oath:

- (1) "that he is not a member of the Communist Party or
- (2) "affiliated with such party, and
- (3) "that he does not believe in, and is not a member

of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

Of the six justices who participated in the consideration of the case, only three, that is the Chief Justice and Justices Reed and Burton, voted to uphold the statutory provision in its entirety. Three justices, on the other hand, regarded the statutory provision as unconstitutional in whole or in part. Of these, Justice Black thought the provision unconstitutional in its entirety. Justice Frankfurter expressed the view that the exaction of that part of the oath above designated as (3) is unconstitutional, and evidently viewed the portion designated (2) as likewise invalid. Justice Jackson thought part (3) of the oath requirement invalid, and the remainder constitutional.

Thus the Court divided 3-3 on that part of the oath labeled (3); divided 4-2 on that part labeled (2); and divided 5-1 on part (1). The Court of Appeals had upheld the oath requirement in its entirety, and its judgment conditioned enforcement of the Labor Board's order upon execution of the complete oath by all of the Union's officers. This Court's affirmance of that judgment is thus, insofar as it compels execution of the entire oath (including part (3)—the "belief" part), by an equally divided court.

Indeed, since if a part of the statutory provision were held unconstitutional a question would arise, not resolved by the court, as to the separability of the remainder of the statute, it may be that the affirmance rests in its entirety upon an equally divided vote. Justice Frankfurter expressed the view that the valid portion of the statute might stand alone, but none of the other justices took a position with respect to this issue.

It is respectfully submitted that the union officers should not, on pain of forfeiting the remedying of unfair labor practices against the Union, be required to execute an oath considered to be unconstitutional by half of the justices of this court who participated in this decision.

It is further submitted that the issues involved in this case

are too controversial and are of too great public importance to be definitively disposed of by an affirmance by an equally divided court of six justices. Such a decision cannot, we submit with all deference, command the general acceptance necessary finally to settle issues so doubtful and so important. It would, of course, be open to the union officers, in connection with some future Labor Board proceeding, again to refuse to sign the oath, or to refuse to sign it except as revised in the light of the dissenting opinions, with a view to bringing the issue again before this Court in order to secure an adjudication in which additional justices might participate. But it would take years for the question again to reach the Court—three years have now elapsed since the employer unfair labor practices which gave rise to this case—, and, in the meantime, the Union would suffer hardship and the status of the oath requirement would remain in doubt.

If, on the other hand, a rehearing is granted, there is every reason to suppose that the issue can be promptly and definitively disposed of by reason of the participation of an additional justice, Justice Douglas. Justice Douglas was absent when this case was argued, but has now returned to the Court and, so far as petitioners are aware, would be available to participate in consideration and decision of the case on re-argument.

### CONCLUSION

For the reasons stated it is respectfully submitted that this petition for rehearing should be granted.

Respectfully submitted,

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I certify that this petition for rehearing is presented in good faith and not for delay.

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Thomas E. Harris